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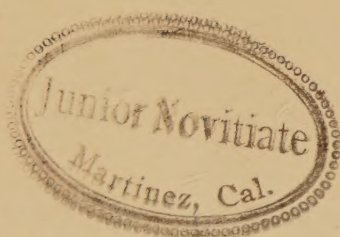
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**THE GOVERNMENT  
OF THE UNITED STATES**

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# THE GOVERNMENT OF THE UNITED STATES

NATIONAL, STATE, AND LOCAL

BY

WILLIAM BENNETT MUNRO, PH.D., LL.B.

JONATHAN TRUMBULL PROFESSOR OF AMERICAN HISTORY

AND GOVERNMENT IN HARVARD UNIVERSITY

REVISED EDITION

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THE GOVERNMENT  
OF THE UNITED STATES  
NATIONAL STATE AND LOCAL

WILLIAM BENNETT JENNIS, PH.D., J.B.  
DIRECTOR OF THE BUREAU OF THE CENSUS  
U.S. DEPARTMENT OF COMMERCE

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PREFACE

To  
the memory of  
**Samuel Walker McCall**  
War Governor of the Commonwealth  
in token of my  
homage and gratitude





## PREFACE

My aim in the preparation of this book has been to provide a general survey of the principles and practice of American government as exemplified in the nation, in the states, and in the several areas of local administration. I have endeavored, so far as the limits of a single volume would permit, not only to explain the form and functions of the American political system, but to indicate the origin and purpose of the various institutions, to show how they have been developed by law or by usage, to discuss their present-day workings, merits, and defects, and to contrast the political institutions of the United States with analogous institutions in other lands. Surprisingly little has been written on the history of American political institutions, and not much more on the principles which they are assumed to exemplify. Text-books, in the main, dilate upon the practical workings of governmental agencies to the neglect of these other things.

The plan, scope, content, and temper of this book are in large measure the outgrowth of my experience as a teacher. My students, by the drift of their questions and discussions, have moulded my ideas of what a text-book ought to contain. This book is theirs as much as it is mine. That fact may help to explain why some features of American government are discussed at considerable length, while others are left as self-evident propositions to the perception of the reader. And if the general tone of the book betrays an optimist, my sufficient answer is that no man can be for many years associated with the American undergraduate and remain anything else.

For this second edition the text has been entirely revised and almost entirely rewritten. Some new chapters have been added; in others the emphasis has been shifted and the newer phases of the subject presented. About the only thing that has not undergone a change is my conception of what a text-book ought to be. I still believe that the history, principles, and workings of a government can best be explained together, not apart.

WILLIAM BENNETT MUNRO.



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**THE GOVERNMENT  
OF THE UNITED STATES**



# THE GOVERNMENT OF THE UNITED STATES

## CHAPTER I

### ENGLISH AND COLONIAL ORIGINS

It is in the colonial charter that we find the germ of American constitutional law.—*Simeon E. Baldwin.*

It goes without saying that the government of a country is of special interest to the people who live under it. Whether it will be of interest to anybody else depends upon the extent of its influence in the moulding of other governments, outside its own borders. Now there are three governments which have been exerting such an influence during the past hundred years, and the government of the United States is one of them. The governments of England and of France are the others. The theory and practice of English government has had, as every student of political science knows, a profound influence upon the development of parliamentary institutions throughout the world. France, in the field of local government, has had an influence almost as great. And the United States has been the progenitor and pattern of federalism. All federal governments established during the past hundred years have been indebted in some measure, and often in considerable measure, to the constitution of the United States. This is true even of the federal governments within the British commonwealth of nations, such as Canada and Australia.

The government of the United States deserves, therefore, to be studied, both by Americans and others, because it is the oldest, the greatest, and the most successful experiment in federalism on the face of the globe. It is true that there were federal governments long before the constitution of the United States was framed, indeed long before Columbus set sail across the Atlantic. There was the Achæan League in ancient Greece, for example.

The governments that have influenced the world.

Why the government of the United States deserves study.

## 2 THE GOVERNMENT OF THE UNITED STATES

Switzerland and the Netherlands afforded more modern illustrations; the former continues to be a federation at the present day. But until the formation of the American Republic there was a general belief that the federal form of government was suitable for small states only, that it was inherently weak because it parcelled power into too many hands, and that no federalism on a large scale could long endure.<sup>1</sup>

An outstanding example of a federal democracy.

But the United States, during the nineteenth century, proved the fallacy of this conviction. America demonstrated to the world that federalism did not necessarily mean weak government, or a house permanently divided against itself. Federalism survived the strain and stress of the Civil War. It spread itself from the thirteen original states to forty-eight. It took more than a hundred million people under its wing and maintained among them the reign of law. It proved itself reconcilable with both the spirit and practice of democracy. And finally, in the second decade of the twentieth century, it gave mankind the latest and most impressive of its lessons, namely, that both federalism and democracy are compatible with great military power and efficiency. Until 1917-1918 the world had not had that fact impressed upon it. It believed, for the most part, that military strength and power went hand in hand with centralization and bureaucracy.

Influence of America upon other federalisms.

There were scarcely any federal governments in existence a hundred years ago. Switzerland and the United States were about the only ones. Together they did not include a population of more than ten millions. Today there are many great federal republics, including Germany, Austria, Russia, and China. The more important British dominions, such as Canada and Australia, are federal republics in everything but name. It is probable that at least a billion people, or more than half the world's entire population, are now living under a general plan of government which was believed to be impracticable until the

<sup>1</sup> This belief, indeed, was so firmly rooted that it continued long after the United States had shown ability to maintain a strong and stable government. When the North and the South drifted into the Civil War there was a chorus of "I told you so" from European political philosophers. The English historian, Edward Freeman, published in 1863 a "History of Federal Government from the Foundation of the Achæan League to the Disruption of the United States." It was generally assumed throughout Europe that the Civil War was merely the outcome of federalism running true to form.



experience of the United States demonstrated the contrary. If, therefore, this experience has a great influence upon the framing of federal constitutions everywhere, there is no occasion for surprise.

A federal system of government does not necessarily involve democracy. It is not federalism alone that has made the United States democratic. Federalism is quite consistent with bureaucracy, as witness the history of the German empire during the decades prior to 1918. It is consistent with military dictatorship as Mexico has abundantly demonstrated. No country can assure itself a democratic form of government by merely resolving itself into a federation of states or provinces. But it is equally true, on the other hand, that a democratic government can be more easily maintained over a wide range of territory under the federal plan than under any sort of centralized arrangement. When the functions of government are largely centralized they tend to drift into bureaucratic hands. An effective way of keeping government close to the people, as political experience has shown, is to allocate a definite sphere of political authority to the component parts of the nation, to the states or provinces as the case may be.

Federalism  
and  
democracy.

In the political history of the American people the most notable achievement has been the welding of many commonwealths into one great federal state. For this accomplishment the main credit has usually been given to the group of fifty-five men who sweltered through the summer of 1787 in the convention hall at Philadelphia and by their unremitting labor produced the Constitution of the United States. But the thirteen colonies which they welded into an enduring union had already been brought by more than one hundred and fifty years of historical development into a close political kinship. That was what made any sort of organic union possible. The American Revolution was merely the culmination of colonial growth, and the constitution was the logical outcome of conditions which the Revolution brought into being.

The indebtedness  
of the  
United  
States to  
English and  
colonial  
experience.

In one sense the American Revolution was not a revolution at all. It was not a cataclysm like the French Revolution of the eighteenth century, or the Russian Revolution in the twentieth; it did not sweep away fundamental institutions, or transform political ideals, or shift the weight of political power from

The continuity of  
American  
political  
history.

one class among the people to another. It was a secession. It merely changed the resting-place of sovereignty. The sovereign power had hitherto been vested in the crown. It had been exercised by the grant of charters or through instructions sent by the home authorities to the colonial governors. Henceforth it was to vest in the people of the thirteen commonwealths, to be exercised by them through their own constitutions and laws. In the continuity of American political institutions, therefore, the revolution marks a break of no great violence. It guided political evolution into new channels, and set the political ideas of the New World more clearly before its people.

The Revolution in its proper setting.

It is natural that writers who deal with a revolution should be tempted to over-emphasize its revolutionary aspects. For the most part, they have made too sharp a separation between the two great periods of American history, with the Revolution as the dividing line. They have written as though the political institutions of the one period owed nothing, or at any rate very little, to those of the other. Yet the fact is that the American Revolution retained far more than it swept away. It gave new life and strength and stability to many old institutions. It is difficult to find any important American political institution whose birth-date can be definitely set down as A. D. 1776. Federalism did not begin with independence, nor did democracy.

The true beginnings of American political institutions.

To find the true foundations of the American political system one must look beyond the constitution, beyond the Declaration of Independence, even beyond the coming of the Mayflower to Plymouth. The principles of civil liberty and self-determination did not have their birth on the soil of the New World. Their beginnings go back to the days of the Saxon folk-mote and the Curia Regis of Norman England. The privileges of the free citizen, as established by Magna Carta, the Bill of Rights, the Habeas Corpus Act, and by the whole fabric of the Common Law were the patrimony of the American colonists from the outset. They brought these privileges across the Atlantic with them, just as they brought the English language. By migrating to America they lost none of the rights and liberties which they had possessed at home. They did not therefore create anew but brought with them the political traditions upon which a free government could be set up. The right to a share in the making of laws, the right of self-taxation, the right to trial by

jury, the right of petition, the right of all men to be dealt with equally before the law—these rights did not originate in America. They are the heritage of the whole Anglo-Saxon race. The American Revolution preserved them at a time when they were in danger of being trodden underfoot and the American constitutions, both state and national, merely asserted them anew.

The thirteen colonies which formed the nucleus of the United States were the outgrowth of small communities planted along the Atlantic seaboard during the course of the seventeenth century.<sup>1</sup> When the first settlers came, it was not with the idea of founding new states; hence they were organized as trading companies with charters similar to those given to such corporations in other parts of the world. But the colonists soon found that something more than this was necessary. Hence the company charters gave way in some cases to colony charters; or where no such charters were forthcoming, the people went ahead without the formal authority, establishing their own local and general governments. But the lines of this political development were not everywhere parallel. In point of time there was a wide spread between the founding of the first colony in 1607 and the last of the thirteen colonies in 1733. Much had happened in the mother country during this interval. The circumstances under which the different colonies were founded also varied considerably—Maryland and Pennsylvania, for example, were the patrimony of individuals, not of trading companies. Differences in the occupations of the people and to some extent in the temper of the colonists themselves led to a departure from uniformity throughout the various communities. On the surface, accordingly, there were considerable differences in political organization. Some had charters, some did not. In some the basic area of local government was the county, in others the town. In some the spirit of democracy was more vigorous than in the rest. These political differences were not, however, of great importance. If the general and local governments of Virginia and Massachusetts, for example, appear in colonial days to have been quite dissimilar, that is only because contrasts always appear more sharply than similarities when one takes only a superficial view of two governments. In their political

Unity of  
the  
colonies.

<sup>1</sup> For a narrative of this political development, see Professor Edward Channing, *History of the United States*, Vols. i-ii (N. Y., 1905-1908).



ideals and institutions all the colonies were fundamentally alike; the differences among them are of slight account when weighed in the balance with the broad and deep resemblances. All the colonies had been founded by Englishmen or had passed under English control. The crimson thread of kinship ran through them all. The population everywhere was overwhelmingly of one religious faith and nearly all claimed the English language as their mother tongue. The common law of England formed the basis of the legal system everywhere. There was a substantial unity in language, in religion, and in law, and these in all ages are the great bonds which have drawn neighboring communities together.

It was because of this unity in race, language, religion, and law that there was a substantial similarity in political institutions.<sup>1</sup> To begin with, the basis of colonial government was in each colony the same. Alike in all of them it was the supremacy of the crown. Explorers went out under royal auspices; they took possession of new lands in the sovereign's name; the territories which they gained became royal property. This was because the English constitution made no provision, in those days, for the acquisition and government of provinces outside the realm. It gave parliament no jurisdiction outside the British Isles. So the crown gave the first company charters; it also gave the colonial charters which replaced these earlier grants. When a colony had no charter, its government existed only by royal recognition. Even the proprietary colonies were held by grant from the crown. In theory, therefore, the crown was supreme as respects the colonies, and in America this doctrine lived on and was recognized until the Revolution. Parliament granted no charters, appointed no governors, and rarely passed laws that extended to the colonies. The king's supremacy over the plantations went for a long time practically unchallenged. Not until the closing years of the colonial period did parliament ever assume to interfere with the forms of colonial government, and at no time did the colonists concede its claim to do so.

<sup>1</sup>The best general outlines of political organization in the colonies as a whole are those given in C. M. Andrews, *Colonial Self-Government, 1652-1689* (N. Y., 1904), and in Evarts B. Greene, *Provincial America, 1690-1740* (N. Y., 1905). Mention should also be made of J. T. Adams, *The Founding of New England* (Boston, 1921).

The basis  
of colonial  
government  
— royal  
supremacy.

But in England the doctrine of royal supremacy lost ground. Parliament was able to bring the crown under its influence, and though it left the royal prerogative in outer form unimpaired, parliament steadily arrogated the real power to itself. At the middle of the eighteenth century, accordingly, Englishmen on both sides of the Atlantic were living under the same sovereign but under different notions as to the true rôle of the crown in matters of government. In England the virtual supremacy of parliament was established and recognized; in America the colonists knew and admitted no sovereignty but that of the crown. This point should be made clear, otherwise the attitude of the colonists in the days before the Revolution is not easy to understand. The thirteen colonies were alike in their subjection to the crown; they were also alike in their disregard of the fact that in the home land the old royal powers had passed under the sway of parliament.

Decay of  
this basis  
in England.

It has been customary to divide the thirteen colonies into three groups, namely, charter, royal, and proprietary. Connecticut and Rhode Island had charters and elected their own governors. Massachusetts after 1691 had a charter with an appointive governor.<sup>1</sup> Pennsylvania, Delaware, and Maryland belonged to proprietors, and these proprietors appointed the governors; the remaining seven colonies had neither charters nor proprietors, hence they were directly under the control of the crown, and by the crown their governors were appointed. But this differentiation in colonial status is not of any great importance, for all of the colonies were under relatively the same degree of control by the crown and its officers, and all of them, whether with charters or without, had much the same degree of freedom in managing their own affairs. For the present-day student of colonial institutions it would have greatly simplified matters if the English crown, in early days, had made all these things uniform,—if it had given all the colonies the same charter or given them all no charters at all. But that has never been the English way of doing things. The fact is that at no time was there any serious effort to make clear, beyond any chance of future dispute, just what autonomy a colony was to have and what final powers it was not to have. Consequently the measure

The forms  
of colonial  
government  
— charter,  
royal, and  
proprietary

<sup>1</sup>These various charters are printed in William MacDonald, *Select Charters Illustrative of American History, 1606-1775* (N. Y., 1899).



## 8 THE GOVERNMENT OF THE UNITED STATES

of self-government varied from time to time and from place to place. It was a matter of give and take. The general attitude on both sides, until just before the Revolution, was to refrain from any quarrel over theories or fundamentals of government, to deal with each problem as it arose, one or other side giving way as the circumstances seemed to dictate. This, indeed, has been a characteristic of English colonial policy at all stages of its development and in all parts of the world. A colonial policy of that character has its defects, no doubt, but its advantages also. Opportunism in colonial policy is preferable to dogmatism.

How  
England  
controlled  
the colonies.

The crown, of course, did not exercise its powers directly. It controlled the colonies through administrative agencies. The agencies of control were not the same at all periods, but broadly speaking it was the practice to leave to the Board of Trade<sup>1</sup> all matters relating to colonial commerce, while political questions, including the making of appointments, were placed in the hands of the Privy Council. This latter body acted, as a rule, on the advice of a standing committee known as the Committee for Plantation Affairs. But the jurisdiction of the Board of Trade was never strictly defined, and the crown, either directly or through its ministers, sometimes interfered. In any event all instructions went to the governors in the name of the crown. The crown also could veto laws passed by a colonial legislature. This power was frequently used and about as frequently evaded. When one law was vetoed the colonies merely enacted another one just like it. In this way the veto power was virtually nullified. As for parliament, it had no way of controlling colonial affairs except in so far as it could influence the Lords of Trade or the Privy Council. Acts of parliament did not apply to the colonies unless they made express stipulation to that effect, and in very few was such provision made until after 1760. Then, when parliament began its practice of enacting special revenue

<sup>1</sup> Its full title was the "Board of Commissioners for Trade and Plantations." It was organized in 1696 and originally had eight members. The commissioners were commonly called the Lords of Trade although most of them were commoners. A general statement of the Board's functions may be found in Edward Channing's *History of the United States*, Vol. ii, pp. 231-235. The relations between the colonies and the home authorities are described in G. L. Beer's *Origins of the British Colonial System* (new edition, New York, 1922) and his *British Colonial Policy* (new edition, New York, 1922).

laws for the colonies, its right to do so was openly denied by the colonists.

On the whole the system of home control was not well organized or efficient. There was too much diffusion of power and responsibility. There was always room for divided counsels, inaction and delay. The several colonies were also divided among themselves and sometimes jealous of one another. A strongly centralized colonial office in London could have turned this situation to its own advantage. But there was no such dominating agency of control. And when the home authorities did finally show unity and vigor of purpose, it was in behalf of a course which united the colonies in opposition. The opportunity had gone by.

Let us take a brief survey of the American political system as it existed before the Revolution. Each of the thirteen colonies had a governor as its chief executive; in the eight "royal provinces" this official was appointed by the crown, in the others he was either elected by the people or named (as in Pennsylvania) by the proprietor of the colony. The position of the colonial governor was something like that of the king at home; he summoned the colonial assembly and could dissolve it when he willed. In some respects his authority was far more extensive than that of the crown, for he had the right to veto the assembly's acts, while in England the crown had lost this power in relation to acts of parliament. The appointing authority of the colonial governor was also extensive, and he was the head of the militia in each of the colonies. The governors were of various types, but the appointive ones were not usually of high caliber. Their work was difficult and often uncongenial, because the office carried a dual responsibility. On the one hand the governor was the overseas representative of the crown. In this capacity he was expected to carry out instructions from London issued by men who frequently knew next to nothing about colonial conditions. On the other hand, he was the pivot of local administration, responsible for the efficient management of affairs yet dependent upon the colonial legislature for money and support. The colonial governor had to serve two masters, one who gave him his appointment and the other who gave him his pay. And there is good authority for the saying that "no man can serve two masters." at any rate he cannot serve two

Frame-  
work of  
colonial  
govern-  
ment: The  
governor.

## 10 THE GOVERNMENT OF THE UNITED STATES

masters and hope that both will be equally pleased with his work.

His  
powers.

It would be inappropriate to set down in these pages a list of the principal administrative powers exercised by the colonial governor were it not for the fact that many of them have continued to be vested in the chief executive of the states and the nation. He enforced the laws, made appointments, and commanded the colonial militia. He represented the colony in all external affairs and had the power of pardon. The most effective check upon his authority was the assembly's control of the colonial treasury. There was little that the governor could do without money and there was no way of getting the money unless the assembly voted it. It was as true in colonial days as in our own that they who hold the purse hold the power.

The colo-  
nial legisla-  
ture.

In each colony there was also a legislature, usually composed of two branches. The lower chamber, or assembly, was in all cases elected by the people, but each colony had its own qualifications for voting and in most of them these requirements were strict. The ownership of property was usually required as a prerequisite for voting, and often religious tests were imposed as well.<sup>1</sup> On the whole, however, the suffrage was more democratic than in England where rotten boroughs and pocket boroughs were sending members to parliament by the score. The members of this elective chamber were chosen by towns in New England and by the counties in the southern colonies, usually for short terms. In all the colonies except two or three the legislature also had an upper chamber. These upper chambers were primarily executive bodies; in most cases the members were named either by the crown on the recommendation of the royal governor, or by the proprietor. In addition to being the upper house of the colonial legislature, this body served as the governor's council, advising him and sometimes controlling his appointments. Its principal functions, indeed, were executive and judicial rather than legislative. Here originated, by the way, our present-day practice of giving executive duties to the upper chamber of the legislature—for example, the power to confirm appointments. The colonial legislatures passed laws and claimed the sole right to legislate on any matter which

<sup>1</sup> For a full survey see A. E. McKinley, *The Suffrage Franchise in the Thirteen English Colonies* (Philadelphia, 1905).

concerned the colony's internal affairs. If the worst came to the worst they could even shut off the governor's salary. They alone could authorize the levy of taxes, and this control of the purse gave the colonial legislatures an indirect but nevertheless a strong hold upon the course of executive policy. In most of the colonies, however, all legislation was subject to the governor's veto and subject also to disallowance by the English authorities if they saw fit.<sup>1</sup> The powers of these colonial legislatures were growing steadily when the eve of the Revolution approached.

In all the colonies the groundwork of jurisprudence was the common law of England. It was not established in the colonies by any definite enactment, but like other Anglo-Saxon institutions it migrated with the flag. Such statutes, moreover, as had been passed by Parliament before the settlement of the colonies were also applicable. In addition, the colonial legislatures (subject to the governor's veto and to the power of disallowance by the home authorities) had the right to make laws so far as these were not repugnant to the laws of England. In recognition of the fact that new countries present new legislative requirements, the colonial assemblies were given a fair degree of freedom in law-making; although governor's vetoes were not rare, and colonial laws were sometimes disallowed when copies reached England. The colonists thus became familiar with two political ideas which have continued orthodox in America to the present day, first, the idea of an executive veto and, second, the idea that a law may be invalid because of its repugnance to usages or statutes more fundamental than the law itself; in other words the concept of unconstitutionality.

Laws  
and the  
disallow-  
ance of  
laws.

In one great field the colonial legislatures were virtually supreme, namely, in the matter of raising revenue. From time to time they formally declared their exclusive right to determine what taxes should be levied, and on the whole they managed to make good their claims in this domain of government. The legislatures also controlled the appropriations, but there were numerous disputes as to whether this control gave the legislatures full power to fix salaries, particularly the salaries of the judges, most of whom were appointed by the governor. On this point, however, the colonial legislatures usually had their way.

The  
control of  
taxation.

<sup>1</sup> E. B. Russell, *The Review of American Colonial Legislation by the King in Council* (N. Y., 1915).



The judiciary.

As for the judicial organization some differences existed among the several colonies, but here again the general lines were uniform. All of the colonies had local courts, usually presided over by justices of the peace who were appointed by the governor. Above these came, in most cases, the courts of quarter sessions made up of the justices in each county. And finally, each colony had a higher court which in some cases consisted of the governor and his council but which in others was a separate body made up of regularly appointed judges. From these highest colonial courts appeals might be carried to England where they were decided by the Privy Council in some cases. The Privy Council was not a court in the ordinary sense; its right to confirm or quash the judgments of the colonial courts was merely one phase of its authority to advise the king, who in turn was the final arbiter in all matters affecting the colonies. Until the years preceding the Revolution appeals to the Privy Council were not frequent, but they steadily became more common after 1750. All of the colonial courts followed English judicial procedure; the right of trial by jury and the other privileges which Blackstone calls "the liberties of Englishmen" were everywhere given full recognition. The colonists thus became schooled by actual experience in the doctrine that men had "unalienable" rights.

Local government:  
1. In New England.

It was in the field of local government that the greatest differences in the form if not in the spirit of colonial government appeared. Differences in the physical conditions under which the colonists lived was the mainspring of this departure from uniformity in managing their neighborhood affairs. In all the New England colonies the unit of local administration was the town, with its town meeting of all the citizens and its elective local officers. The town raised its own taxes and spent them, made its own by-laws, elected its own local officers and sent its representative each year to the colonial legislature. It was a miniature republic, rarely interfered with from above. This splendid and enduring type of local government was the joint product of racial temperament and geographical environment, and great importance should be attached to the training in self-government which the men of colonial New England secured through a simple and democratic plan of handling their neighborhood affairs. It had a considerable part in determining the common attitude on public questions in later days.



The southern colonies, on the other hand, established the county as their chief unit of local administration. They chose to use this larger unit because the plantation system of agriculture caused the population to be more widely scattered. County officers, such as the sheriff and the coroner, were appointed by the governor, and there was no general meeting of all the inhabitants to vote the taxes or to determine matters of local policy. As in the English counties of the day much of the work was performed by "justices of the peace," who, despite their name, were administrative as well as judicial officers. They, also, were appointed by the governor. Finally, in the middle colonies, particularly in New York and Pennsylvania, there was a mixed type of local government, a combination of the town and county systems, which bridged the gap between the extremes of New England and the South. Yet the differences in the frame of local government throughout the thirteen colonies were not greater than those which one can find among the several states to-day. They did not impair the political homogeneity of the people. The principle of local autonomy was everywhere strongly upheld and asserted.

With such general approach to uniformity in race, religion, language, and law, with such marked similarities in political organization and development, with common problems arising from the pressure of outside enemies, it might be expected that the various colonies would steadily draw more closely together and develop in time some form of federal union. There were some steps in that direction. As early as 1643 the four New England colonies of Plymouth, Massachusetts Bay, Connecticut, and New Haven united in a league of friendship, particularly for mutual support against Indian attacks. It was arranged that each of these colonies should send two delegates to a joint conference each year. For many years this New England confederation proved a useful agent of inter-colonial action, but it was at best a weak and incomplete arrangement. There was, moreover, a great deal of jealousy among its four members, and its existence ceased after the Indian dangers, against which it had been organized, had passed away.

From time to time during the next hundred years other proposals for confederation were made. William Penn made such a suggestion in 1696, and at various dates conferences repre-

2. In the South.

Early attempts to federate the colonies :

(1) The New England Confederation of 1643.

(2) Penn's suggestion, 1696.

## 14 THE GOVERNMENT OF THE UNITED STATES

senting several colonies were called to discuss the possibilities.<sup>1</sup> But the clash of diverse interests invariably proved to be a stumbling-block, and it required a serious common danger to impress on all the colonies their essential unity and their need of coöperation. Something of this sort came into view when the French wars demonstrated to all the New England and middle colonies their weakness as isolated units in the face of an aggressive and united enemy.

The next move was inspired from England. At the suggestion of the Lords of Trade a congress was called at Albany in 1754 to form a confederation for mutual defence, and especially to devise a plan for keeping the Iroquois Indians from joining with the French in Canada. Seven colonies were represented, the southern ones did not send delegates, as the immediate danger seemed to be far from their own doors. Benjamin Franklin brought forward a plan of union, and the congress, after making some changes, adopted it unanimously. Franklin's plan, commonly known as the Albany Plan of Union, contemplated a conference or congress made up of one delegate from each colony, this conference to determine the means of common defence, the number of troops to be supplied by each colony, and the amount of money to be contributed by each. The crown was to appoint a president-general, who should command the united forces and have the spending of the money so raised.<sup>2</sup> Franklin was ahead of his time, and although the delegates at Albany approved this plan, it was rejected by the several colonies when it went before them for approval. The home government, too, became lukewarm over it. The Albany plan, accordingly, came to naught. But it did have an influence in paving the way for the first Continental Congress of the Revolutionary War.

One further meeting of colonial delegates before the actual outbreak deserves a word, namely, the so-called Stamp Act Congress. In 1765, at the suggestion of Massachusetts, the representatives of nine colonies met at New York to draw up petitions to the home government on colonial grievances, par-

<sup>1</sup> William Penn's "Plan for a Union of the Colonies," February 8, 1696-1697, in the *Pennsylvania Magazine of History and Biography*, xi, p. 496 (1887).

<sup>2</sup> The plan may be found in *The Writings of Benjamin Franklin* (ed. A. H. Smyth, 10 Vols., N. Y., 1907), iii, p. 212.

(3) The  
Albany  
Congress,  
1754.

(4) The  
Stamp  
Act  
Congress,  
1765.

ticularly with reference to the Stamp Act. This congress had no plenary powers, of course, and no project of union was at this time broached, but the episode was an indication that when any matter clearly threatened their interests, most of the colonies could readily get together and take a common action. Union might be impracticable, but united action was not.

Why was it, in view of the manifest advantages of coöperation, that the thirteen colonies did not come into some sort of working federation long before the actual outbreak of troubles with England? Local jealousies afford one reason. A failure to realize that, in a broad sense, all their interests were alike, is another. The home government, moreover, was never favorable to any scheme of union such as would give the colonies a permanent solidarity of action in all matters. It was ready to have them join for the common defence, provided the carrying out of such plan was entrusted to officers sent out from England. In a word, the colonies never realized their essential unity until the acute controversy with the mother country made it clear to them. Then, and then only, did any real union become practicable.

Reasons  
for the  
failure to  
unite.

The thirteen colonies, prior to the Revolution, did not form a complete democracy by any means. Yet there was probably more genuine democracy along this strip of seaboard than could be found in any area of equal extent on the face of the earth. True it is that only a minority of the colonists had the right to vote, but even so, the proportion was much larger than in England. True it is, also, that in some of the colonies, the government rested in the hands of a small, aristocratic class. But these were days when, in England herself, the nobility dominated the politics of the land. True it is, finally, that religious toleration did not exist in all the colonies—but where did it exist in the seventeenth and eighteenth centuries? The significant thing, after all, is this: In the colonies there was a public opinion and it was powerful. It ruled. The colonial assemblies, if they were not chosen by the whole people, were good reflectors of the public sentiment. They were more truly representative than was parliament. They judged the public temper more shrewdly. If parliament had done it as well there would probably have been no Revolution. The people of England did not desire to oppress or coerce the colonies, and if parliament had truly

Democracy  
in the  
thirteen  
colonies.

reflected the English popular mind it would not have tried to do so either.

This is not the place to narrate the events which led to the breach with England. It should be pointed out, however, that there was no general dissatisfaction with the type of government which existed in the various colonies. The revolution did not come because all the colonies wanted new charters or elective governors or manhood suffrage. Its underlying causes were economic; they concerned questions of trade and taxation. But once the spirit of resistance was aroused, it found, as it always does, new and broader grievances. The colonists soon came to a realization of the fact that democracy, especially in New England, had been forging ahead more rapidly than at home, and in the Declaration of Independence new ideals of democracy, unknown at this period in England, found lofty expression.

It was the events of 1773-1774, including the imposition of the new taxes and the four repressive acts of parliament suspending the charter of Massachusetts and instituting other drastic measures of coercion, which supplied the inspiration to union hitherto lacking among the colonies. One of their number was now in danger of having its liberties curtailed: what of the others, each in turn? Singly the thirteen colonies might easily be brought one after another to comply with the demands of parliament. The danger was not now confined to north or south; it was common to all. Hence the calling of the first Continental Congress, which met at Philadelphia in the autumn of 1774 with delegates present from all the colonies except Georgia. These representatives were chosen in a variety of ways, some by the colonial legislatures, some by conventions, and some by the committees of correspondence or informal committees of townsmen such as had been established in Massachusetts to unify popular action in case the legislature should be dissolved. The object of this congress was to ward off an impending common peril by showing a united front. Its members adopted various addresses to the home authorities; pledged the coöperation of all the colonies in resistance to oppressive demands, and, finally, agreed that a similar congress should be called in the following year.

But events were moving rapidly. Before the early summer of 1775, when this second Continental Congress assembled, once

The first  
Con-  
tinental  
Congress,  
1774.



again at Philadelphia, the situation had rapidly gone from bad to worse. The open clash of arms had come at Lexington and Concord, and the fate of Massachusetts seemed to be sealed unless the other colonies should quickly and loyally come to her aid. There was now no hanging back. All the colonies without exception sent their delegates to the Continental Congress of 1775, and this body at once assumed general direction of the whole colonial cause. Without any quibbles as to the source or scope of its powers the congress appointed Washington to the chief command, called upon all the colonies for assignments of troops and supplies, and took upon itself the right to issue paper money on the joint credit. Its powers were usurped out of the necessities of the situation; the legal questions were left to be discussed and settled later. The only sanction of its acts was the acquiescence of the people, but in the last analysis is not this the only effective sanction that any public authority can have?

The  
second  
Conti-  
nental  
Congress,  
1775.

Here was an unusual situation. The colonies were still subject to the king although in active resistance to the royal authority. They had tacitly assumed the attributes of sovereignty without declaring themselves sovereign states. They had become belligerents without formally severing their old allegiance. This situation, however, came to an end with the Declaration of Independence in 1776. On July fourth of that year the colonies became states, each independent of the crown and politically independent of each other. This action made it even more imperative that the Continental Congress should rest on a firmer and more stable basis than that of a body brought into being by revolution, with no clear definition of its powers or duties. Accordingly, on November 15, 1777, the Continental Congress sought to gain for itself the forms of legality by adopting the "Articles of Confederation and Perpetual Union," which had been in process of preparation by one of its committees for some months previously. This step was the culmination of the long process by which the thirteen communities had been brought to a full realization of their political kinship; it was at the same time the starting point from which, ten years later, a far stronger and more lasting union was evolved.

The  
Declara-  
tion of  
Independ-  
ence, 1776,  
and the  
Articles of  
Confedera-  
tion, 1777.

## CHAPTER II

### PRELIMINARIES OF NATIONAL GOVERNMENT

The origin of the federal government presents no great difficulty to anyone who has carefully studied the constitutional history of the early states and colonies. He finds that the central government of the United States, in its general structure and various branches, is scarcely more than a reproduction on a higher plane of the governments existing in the previous states.—*William C. Morey.*

A word of  
introduction.

The great English statesman, Gladstone, once spoke of the American constitution as a document "struck off at a given time by the brain and purpose of man." That statement needs a great deal of qualification for it implies that the constitution was a spontaneous affair. The words which form the constitution were put together at a given time by a small body of men; but the ideas represented a process of growth. They represented not only a process of growth in the minds of the people, but of actual testing by experience. Without the experience of the thirteen states under their own state constitutions, without their experience under the Articles of Confederation, the constitution which they adopted in 1787-1788 would have been vastly different, if, indeed, they would have been willing to adopt a new constitution at all. The principles which lie at the basis of American government were worked out, not struck off. And in this process of working-out, the period of the Confederation (1777-1787) taught the American people a great many lessons.

Importance  
of the  
Articles.

The action of the Continental Congress in preparing and adopting the Articles of Confederation ought therefore to be looked upon as a step of profound importance in the evolution of the American political system. Now, for the first time, a group of delegates representing all the states were ready to set up a union which would be something more than a mere alliance for the common defence, which would be "perpetual" in character and thus endure in peace as well as in war. That,



of itself, is enough to designate the adoption of the articles as a milestone in the march towards a real federation.

But far more deserving of attention is the fact that the various provisions of the articles had a dominant influence upon the minds and actions of those who formed the national constitution ten years later. Some of these provisions worked out well, and they were perpetuated in the new constitution; others worked so badly that they were discarded without much regret or hesitation; while still a few others, not having clearly demonstrated their full possibilities for either good or ill, were either dropped altogether or retained in modified form. The experience of the states under the Articles of Confederation was of the greatest value in this way, subjecting various political theories, as it did, to the test of actual operation under difficult conditions. The student of political institutions should not pass lightly over the ten critical years in which the Articles of Confederation embodied, somewhat crudely perhaps, the principles and practice of New World federalism. These were formative years of the greatest importance, and the American people probably learned more about the science of government in this decade, 1777-1787, than in any other.<sup>1</sup>

Their  
influence  
on the  
constitution.

The Articles of Confederation and Perpetual Union were framed by the Continental Congress after a good deal of discussion which served to show that no one among the delegates had much enthusiasm for the makeshift system of government which they established. For they were little more than a makeshift, framed to cope with an existing emergency. They were then sent to the legislatures of the thirteen states for ratification and ultimately all the states did ratify, although some of them took a long time doing it.

How they  
were  
framed.

By the provisions of the articles the several states entered into a simple league of amity; but each state retained its sovereignty, freedom, and independence. Every right not expressly delegated to the confederation remained with the states. The organ of the confederation, as provided by the articles, was to

Their  
general  
provisions

<sup>1</sup> A. C. McLaughlin, *The Confederation and the Constitution* (N. Y., 1905), is the most useful single volume on this period. John Fiske's *Critical Period of American History* (18th ed., Boston, 1898), is an extremely interesting book, but not always accurate. Mention should also be made of James Brown Scott's *United States of America* (N. Y., 1920), especially Chapter iii.

be a congress made up of delegates from all the state, each state to send not fewer than two nor more than seven. But whether a state sent the minimum or the maximum number of delegates, it was in any case to have one vote only. The legal equality of all the states was thus recognized, although there were already great differences among them in area and in population. Virginia and Massachusetts each had, at this time, eight or ten times the population of either Georgia or Delaware or Rhode Island. The union was thus a loose confederation, as distinguished from a close or organic federation of states.<sup>1</sup>

Powers of  
Congress  
under the  
Articles  
of Confed-  
eration.

As for powers, the congress of the new confederation was given relatively few. It was to manage the war and to handle foreign relations. It might call upon the several states for contributions of money or men, but it had no way of compelling them to respond. It had various internal powers such as those of establishing a postal service and managing Indian affairs. With nine of the states assenting, it could make treaties, borrow on the joint credit, coin money or issue bills of credit, and did issue paper money in large quantities to pay the expenses of the war. But it had no power to tax, no power to regulate trade, and no effective authority to settle disputes among the various states themselves. The powers lodged in the congress by the articles were woefully small when judged in the light of later events, nevertheless they represented substantial concessions on the part of the states. Public opinion was not at the time prepared to go much farther. The people were afraid of "strong" governments. The feeling of national solidarity even under the stress of a war for existence, had not yet developed to the point of rendering a stronger union possible.

The ex-  
ecutive.

By the Articles of Confederation little attention was bestowed upon the executive branch of the government. It was apparently assumed that the congress, while in session, would itself perform all necessary executive functions, but provision was made for a committee of the states to sit and act when the congress was not in session. No mention was made of executive officers, but it was taken for granted that the congress might appoint such as were needed, and it did so appoint a superintendent of

<sup>1</sup> For the exact text of the articles see William MacDonald, *Select Documents Illustrative of the History of the United States, 1776-1861* (N. Y., 1903).

finance, a secretary of war, a foreign secretary, and other officials. In this action it foreshadowed the "heads of departments" who later became an integral part of the federal executive under the constitution of 1787.

Despite the mild nature of these articles, the various states were slow in ratifying them, and it was not until 1781 that all had given their assent. Consequently the main dangers of the war were over before the confederation completed all its legal formalities. So long as the issue of the war hung in the balance the instinct of self-preservation moved all the states to give the Congress of the Confederation a varying degree of support. Some responded to every call for men, supplies, and money; others lagged behind. Each state's compliance depended partly upon its own native spirit of loyalty and partly upon whether the state lay within the zone of immediate war danger. The congress had no coercive power; it had no means of compelling any state to bear its due share of the war burden. During the years 1782-1783 it called upon the several states for contributions amounting to ten million dollars but received only two millions in all. Robert Morris, the treasurer of the confederation, lamented that talking to the states was like preaching to the dead. When he asked permission to levy small duties on imports, one state refused concurrence and the whole proposal failed. Nothing would have been gained by issuing more paper money for the country was already flooded with it. Without money the congress was practically without power.

Ratifica  
tion of  
the  
Articles.

So far as the confederation was concerned, things were getting into a bad way. There was a constitution (the articles); there was a congress; and there were sundry executive officials. But they were gradually ceasing to function effectively. The war had enormously inflated the currency (as war almost always does), and prices went sky-high. We are amused nowadays when we read that a pound of tea in Germany costs a million paper marks, but forget that in 1781 a pound of tea cost a hundred American dollars. The reason is the same in both cases—too much paper money and too little tea. Everybody cried out in these years that the cost of living was excessive—which, of course, was true. Discontent was rife; the farmers blamed the merchants; the people of each state clamored for tariffs against its neighbors; there was a general economic confusion. Small



wonder it is that the Congress of the Confederation did not function well. Under the circumstances it did better than anyone had a right to expect. At the least it kept things together and going.

The first  
state con-  
stitutions.

Turn for a moment from the affairs of the confederation and see what the states themselves had been doing during the war and after. As the hostilities spread from one colony to another in the early months of the war, the various royal governors and officials left the country, thus breaking down, in part, the existing governments. In consequence of this the Continental Congress, even before it adopted the Declaration of Independence, advised that each colony should reconstruct its government to suit its own needs. Some of them lost no time in following this advice. Connecticut and Rhode Island merely made a few changes in their colonial charters and let it go at that. Virginia, on the other hand, elected a convention which, under Jefferson's leadership, adopted a constitution with a bill of rights and provision for a new frame of state government. One after another the remaining states followed, until Massachusetts, the last of the thirteen, adopted her first state constitution in 1780.

Their  
chief  
provisions.

While these constitutions differed considerably in their detailed arrangements, they all present a marked similarity.<sup>1</sup> In every case provision was made for a governor, to be chosen by the legislature or by the voters; in nearly every instance there was provision for a legislature of two chambers; and in each for a judiciary, appointed either by the governor or by the legislature or by a branch of the legislature. The colonial governor's right to veto legislation was abolished in all but two states, and in every one of them the governor's appointing authority, as it had existed in colonial times, was taken away or curtailed. Greatly increased powers were everywhere allotted to the state legislatures. The principle of the separation of powers, that is, of keeping the executive, legislative, and judicial powers separate, gained recognition in only a few of these state constitutions; but in two of them it was stated plainly, namely, in the Virginia constitution of 1776 which provided that "the legislative, executive and judiciary powers shall be separate and distinct so that

<sup>1</sup> A conspectus, showing the main features of these several state constitutions, may be found in Edward Channing, *History of the United States*, Vol. iii, pp. 459-462.

neither exercise the powers properly belonging to the other," and in the Massachusetts constitution of 1780 which set forth the doctrine in greater fullness as follows: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial power, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men." From this unequivocal statement in two of the new state constitutions, however, it is not to be concluded that the doctrine of separation of powers was already finding general favor. Most of the states did not seem afraid of making the legislature supreme.

The principle of separation of powers.

Another characteristic of the earliest state constitutions was the emphasis which most of them placed upon "bills of rights" containing securities for individual liberty. Many of these guarantees already existed at common law, but the events which preceded and accompanied the Revolution convinced the framers of the various state constitutions that it would be well to have them incorporated into these organic documents. Freedom of speech and of assembly, the right of trial by jury, the privilege of the writ of habeas corpus,—these and many other so-called unalienable rights were now solemnly set forth in black and white. The state constitutions of this war period, indeed, were strongly tinged with that "natural rights" philosophy which marked the Declaration of Independence. They emphasized the doctrine that men were equally free and independent, that all political power came from the people, and that all government rested upon the consent of the governed.

Emphasis upon securities for individual liberty.

Yet these new state constitutions did not establish governments that were radically different in form from those which existed in colonial days. Little or nothing was borrowed from outside. The new state constitutions merely represented an overhauling of what had long existed in the several colonies. Some of them, as has been said, found very little overhauling necessary and in none of the states was there any drastic reforming of the old institutions. So far as the general outline of government in each of these thirteen communities is concerned, the Revolution and the subsequent adoption of new state constitutions made no radical changes. The office of governor was continued. Legislatures, fashioned after the colonial assemblies,

Summary.

were provided for. The courts were continued without much alteration. The common law remained. There were, however, great changes in the *spirit* of government, in the responsiveness of officials to public opinion, in the attitude of the people towards those in authority, and in possibilities afforded for future political development.

The revived  
interest  
in political  
fundamen-  
tals.

The framing of these state constitutions, moreover, had an important educative influence. While they were in process men turned their thoughts to the fundamentals of government. They examined anew a multitude of questions relating to the state and the social order. They talked of Locke and Montesquieu, of social compacts, checks and balances, popular sovereignty and the natural rights of the citizen. Hence there were available in all the states, groups of men who, when the time arrived, could be called upon to help in the larger work of framing a constitution for the nation as a whole. Without the preliminary work done by members of the congress in trying to carry on the government under the Articles of Confederation and by state leaders in the making of these state constitutions—without all this the task set before the federal convention of 1787 would have been infinitely harder to perform. The whole people, moreover, became familiar with the idea of a constitution or fundamental law as the basis of government, a written document emanating from the people, ordained into force either directly or through their representatives, and guaranteeing them against abuses of power. This was something that as Englishmen they had never learned, for England had no written constitution.

The critical  
period —  
drifting  
toward  
anarchy.

Such was the situation which existed in the years immediately following 1783 when peace once more came upon the land. At Philadelphia there was a congress made up of delegates from the several states as provided by the Articles of Confederation. Its meetings were still being held, although rarely were all the states represented. Each of these states had adopted its own new constitution; each was turning attentively to the settlement of its own problems. The states were paying less and less heed to what the congress was doing, and no wonder, for they had troubles enough of their own. Economic conditions everywhere were disorganized, for business had been neglected during the war and the mass of private debts was very large. There was a



great scarcity of real money although the land was flooded with paper notes, some issued by the confederation and some by the states. Each state was seeking to relieve its own necessities by pressing its own advantages, grasping at everything within reach. So avaricious indeed were some in asserting their claims that interstate ill-feeling rapidly developed. In some cases the boundaries between the colonies had never been authoritatively fixed; now that the colonies had become states they were coming close to blows over disputed claims to border territory. New Hampshire and New York were on the verge of hostilities over the possession of the Green Mountain territory. Connecticut and Pennsylvania were squabbling over the upper Susquehanna Valley. "There are combustibles in every state," wrote Washington, "which a spark might set fire to."

Likewise there were commercial jealousies. Each state was hurrying to build up its own trade at the expense of its neighbors. Those which had natural advantages tried to exclude others from the use of them. The initial skirmishing in a war of hostile tariffs and trade discriminations began as early as 1785, when New York imposed fees upon all vessels entering its ports from Connecticut or New Jersey. Virginia and Maryland were at swords' points over the navigation of the Potomac. Great Britain, of course, did not fail to profit by these dissensions. The London government put a heavy hand upon American trade with the British West Indies and delayed handing over the trading posts in the American Northwest, although the treaty of 1783 had promised that these posts would be given up. So trouble was impending all along the line.

Why did not the Congress at Philadelphia intervene to prevent this drift towards federal anarchy? Its members no doubt would gladly have done so had they only possessed the power. But the Congress, without the wholehearted support of the states, had become an almost negligible factor in public affairs. It had no power of taxation and hence no revenues. It had no credit on which to borrow. Yet money was urgently needed to pay interest on loans made in France and Holland as well as in America during the war; also to pay the ordinary expenses of government. To make matters worse, the officers and soldiers of the revolution had in many cases served without pay other than certificates of indebtedness, and they were now clamoring

Weak-  
nesses  
of the  
Confedera-  
tion:

## 1. Its lack of revenues.

for what they had fully earned. The uneasiness of the soldiers for want of pay had become great and dangerous. There was very little gold or silver available to pay anybody, and the "continental" paper notes had finally ceased to pass as currency at all, although they were sometimes bought and sold in bundles by speculators. "Not worth a continental" became a byword. In Rhode Island, when the legislature passed an act compelling the people to accept paper money at its face value the merchants shut up their shops rather than comply.<sup>1</sup>

The Congress, it is true, still possessed its power to call on the several states for money contributions and did so frequently; but it encountered evasion more often than response. Some states quietly ignored the requests; others gave a small part of what was asked and grumbled loudly at that; only in rare instances were calls complied with promptly and in full. In the later years of the Confederation only two states, New York and Pennsylvania, were making any serious attempt to perform their financial obligations to congress. Without funds the Confederation was impotent.<sup>2</sup> It could neither pay off the old army nor raise a new one. It could not meet the interest payments on the national debt. It could not provide ships to protect the commerce of the states against the Barbary pirates who were seizing American seamen in the Mediterranean and holding them for ransom. It could not provide for proper diplomatic representation of the United States abroad. The entire income of the confederation during its later days were less than two hundred thousand dollars a year.

## 2. Lack of credit for borrowing.

By the Articles of Confederation the congress had authority to borrow on the common credit (provided nine states assented), and some loans were secured under this authority. But with no regular revenues to insure prompt payment of interest it was not possible to obtain funds on anything like reasonable terms. The credit of the United States in these critical years was like that of Greece or Bulgaria today. John Adams in 1785 was sent to Europe on a borrowing expedition, but all he could obtain was about three hundred thousand dollars, and for even

<sup>1</sup>This gave rise to the famous case of *Trevett v. Weeden* in which the courts held the "forcing" act to be unconstitutional—one of the earliest (if not the earliest) among decisions of this type.

<sup>2</sup>C. J. Bullock, *The Finances of the United States, 1775-1789; with Especial Reference to the Budget* (Madison, 1895).

this relatively small sum it was necessary to promise an exorbitant rate of interest. Yet any new country, particularly after an exhausting struggle, needs large sums for upbuilding, and this was America's situation.

Equally important among the weaknesses of the Confederation was the lack of any power to regulate trade, either with foreign nations or among the several states or with the Indian tribes of the great hinterland. The regulation of trade involves, as a rule, the making of tariffs. But the Congress of the Confederation could impose no duties of any sort. Each state, on the other hand, was making its own tariff, and each was doing its best to attract commerce to its own ports. The common good counted for next to nothing in their feverish competition. Commercial rivalry among neighboring states was rapidly engendering bad feeling, and a spirit of avarice and retaliation was in the air. A situation of this sort would inevitably lead to serious trouble. Everybody realized it, but nobody had power to act. The Congress at Philadelphia could do nothing but wring its hands and bemoan the course which events were taking. Meanwhile, moreover, the opportunity to make favorable commercial treaties with various European nations was slipping away. It was obviously desirable that such treaties should not be made by each state individually but by the Confederation as a whole, for better results could be had in that way. Unhappily, however, such united action was proving virtually impracticable. "We are one nation today and thirteen tomorrow," said Washington. "Who will treat with us on such terms?"

3. Its lack of power to regulate commerce.

Most ominous of all was the outlook in international relations. England was still intrenched in Canada to the north, while Spain possessed the southwest. The American colonies had won their independence with the aid of France, but who could tell how long the tottering French monarchy would stay friendly or continue in a position to render aid? Two powerful nations of Europe were on the Confederation's flanks: what if they should some day join hands to raid the land and divide the spoils? Nor was such a danger altogether beyond the range of possibilities, particularly if the states should fall to quarrelling among themselves. Even if all should make common cause, stand united, and prepare for trouble, it would continue to present a serious aspect; but without preparation or unity, with the

4. Its military impotence.



states split into rival factions, one faction perhaps calling in outside assistance, the peril would be overwhelming. Seventy-five years later, when a much larger group of American states engaged in civil strife over the issue of slavery, the danger of foreign intervention, and with it the probable disruption of the Union for all time, was still serious. Yet by that time both France and Spain had practically withdrawn from the Western Hemisphere. How much more vividly the danger must have appeared to sagacious men in the last decades of the eighteenth century!

5. Its inability to handle the great Western territories.

Finally, there was the question of the great western territories. At the close of the Revolution all the land east of the Mississippi was claimed by one or another of the various individual states. These claims, some of them based on treaties with the Indians, were hopelessly complicated and in conflict. If each state had undertaken to enforce its own pretensions there would have been a general war. So it was proposed that all should hand over their claims to the congress which would then use the territory for the common benefit, eventually making new states out of it. Gradually the several states consented to do this and in 1787, shortly before the Congress of the Confederation went out of existence, it passed the famous Northwest Ordinance. Although this was probably the most important piece of legislation enacted by the congress it is significant that only eighteen members, representing only eight states, were present to vote on it. How could a central government hope to manage this great western domain firmly and successfully if the individual states were to give it so little support?

General defects of the Confederation.

The shortcomings of the Confederation are well summarized in what Washington called "the absence of coercive power." "I do not conceive," he wrote, "that we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the state governments extends over the several states." In other words the Congress of the Confederation could deal only with the states and not directly with the people as the legislatures of the various states could do. It was a government of the states, not a government of the people. That was its inherent fundamental, incurable weakness. Specifically it was weak because it lacked four things which every strong national govern-

ment must possess: ability to raise revenue by taxation, to borrow money, to regulate commerce, and to provide adequately for the common defence by raising and supporting armies. And these, rather significantly, were the four greatest powers given to the Congress of the United States by the new constitution which in 1787 replaced the old Articles of Confederation.

But we must not think too harshly of the Confederation. Notwithstanding its meager authority the achievements of the old congress were highly creditable. It kept the armies in the field until peace was assured, and in the face of stupendous difficulties furnished them with supplies. Despite its cumbrous executive machinery it negotiated the Peace of 1783 whereby the independence of the thirteen states was recognized by Great Britain. During these years the congress was the sole embodiment of federal authority in America, the one unifying force that held thirteen jealous states from flying at each others' throats. What it lacked in formal powers was to some extent offset by its patience and its patriotism.

What the Confederation accomplished.

During these years there were thoughtful men both in the congress and outside of it who realized that things were moving steadily in the wrong direction. The Confederation, they felt sure, must be strengthened or it would go to pieces. If nothing else, it would go bankrupt, for money is the lifeblood of all governments. For several years the financial officers of the Confederation had been trying to devise some way of filling the treasury. As early as 1781 the congress had made a request to the several states that it be allowed to lay a five per cent tax on certain imports. Nearly all the states were willing, but Rhode Island refused. Two years later a different proposition was put forth, namely, that the several states should collect certain import duties and apply all the proceeds to paying off the debt incurred by the Confederation during the war. But this suggestion was declined by four states. In 1786 matters came to a climax when the congress plainly put the whole matter before the nation. "A crisis has arrived," it declared, "When the people of the United States, by whose will and for whose benefit the federal government was instituted, must decide whether they will support their rank as a nation by maintaining the public faith at home and abroad, or whether, for the want of a timely exertion in establishing a general revenue and thereby giving

Attempts to strengthen the Confederation.



strength to the Confederation, they will hazard not only the existence of the Union but of those great and invaluable privileges for which they have so arduously and so honorably contended."

The  
Annapolis  
conven-  
tion, 1786.

Now it happened about this time (1785) that Maryland and Virginia were endeavoring to reach an agreement concerning the navigation of the Potomac. Commissioners from these two states met for this purpose at Mount Vernon, Washington's home. Having reached an understanding among themselves, they proposed that Pennsylvania be asked to join. Then the Maryland legislature suggested that Delaware be also brought into the matter, with a view of framing a uniform commercial system for all four states. Thus the project enlarged until in the end James Madison persuaded the legislature of Virginia to invite all the states into conference. Accordingly all thirteen states were asked to send delegates to a convention to be held at Annapolis in 1786 to consider the trade interests of the Confederation and "how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony." The response, however, was disappointing, for when the convention met, only five states were represented.<sup>1</sup> The others did not seem to be sufficiently interested. Consequently the Annapolis convention did not feel that it would be worth while to take up the task for which it had been called together. Alexander Hamilton of New York, however, suggested that another attempt be made on a broader scale. It was his opinion, and also the opinion of other leaders, that the various states would take more interest in a conference for revising the Articles of Confederation, and not called merely to discuss commercial regulations. Accordingly resolutions were adopted pointing out the critical condition of affairs and asking all the states to send representatives, not less than three or more than seven, to a convention to be held in Philadelphia the next summer.

The con-  
vention of  
1787.

The purpose of this convention, as stated in the resolution, was "to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union and to report such an

<sup>1</sup> Nine states appointed delegates but only Virginia, New York, New Jersey, Pennsylvania, and Delaware were actually represented.

Act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every state, will effectually provide for the same." Copies of the resolution were sent to the congress and to all the state legislatures. The congress ignored the resolution until it became apparent that the states would take action anyway. This was chiefly because Washington, Hamilton, Madison, Franklin, and others were lending their personal influence in support of the idea. Notice that not a word was said in this resolution about framing a new federal constitution to replace the articles. No one openly proposed that the convention should be authorized to draft a new constitution. The ostensible purpose was to supplement and strengthen the Articles of Confederation. Some of the states acted promptly; others were suspicious and held off; but in the end all of them except Rhode Island responded to the call and appointed their delegates. The invitation did not specify how the delegates were to be chosen, but in all cases the appointments were made by the state legislatures. In no case were they directly elected by the people. The date fixed for the assembling of the delegates at Philadelphia was the second Monday in May, 1787.

## CHAPTER III

### THE CONSTITUTION AND ITS MAKERS

A federal State requires for its formation two conditions. There must exist, in the first place, a body of countries, colonies or provinces so closely connected by locality, by history, by race, or the like, as to be capable of bearing, in the eyes of the inhabitants, the impress of common nationality. . . . A second condition absolutely essential to the founding of a federal system is the existence of a very peculiar state of sentiment among the inhabitants. . . . They must desire union, and must not desire unity.—*Albert Venn Dicey.*

When and where did the making of the constitution begin?

In writing of the federal constitution it is hard to tell where to begin. If you start with the convention of 1787 you will find that the members of that immortal gathering, in almost everything they did, harked back to the constitutions which had been put into operation by the several states. If you begin with these state constitutions you will discover that they cannot be fully understood without going back to the colonial charters. And the colonial charters had their origin and inspiration on the other side of the Atlantic. In the last analysis, therefore, the framing of the American constitution began at Senlac, at Runnymede, at Marston Moor, at Westminster. Simon de Montfort, John Hampden, and Oliver Cromwell, not to speak of John Milton and John Locke—all had a hand in it. In a sense, indeed, Aristotle was one of the framers, for he first enunciated the principle of division of powers, which is the most conspicuous feature of the American constitution.

But a chapter on the making of the constitution cannot well cover the history of political theories from Aristotle to Madison. It will be long enough, and sufficiently comprehensive for all practical purposes, if it explains how the document was framed, who did the work, what manner of men they were, and what difficulties they had to overcome. In truth the work was a great achievement, the greatest in the whole history of the American people. Among the landmarks of democracy in all countries

there is nothing that surpasses it. These Fathers of the Republic, when they finished their task one hundred and thirty-odd years ago, were not over-proud of their handiwork, but they builded better than they knew.

In order to form a successful federation, says Professor Dicey, there must be a certain affinity and a certain sentiment among the people. Both the affinity and the sentiment were present in 1787. The delegates who met in convention at Philadelphia represented a group of states which had already shown their capacity for drawing together in the face of outside pressure and of staying united so long as danger threatened. All had passed through the trials of a long and bitter war; all loved their new freedom because they had been through such sacrifices to make it their own. The people of all the states, practically without exception, were believers in the merits of republican government, for those who did not so believe, the Tories, had been harried out of the land. The convention of 1787, moreover, represented a people who already had acquired a considerable round of experience in the making of new governments, thirteen of them, and had seen these fruits of their own handiwork gain in power. The states themselves were forging ahead, even if the Confederation was not. The public mind had been tuned up by political discussion. And, most vital of all, every one now felt that something needed to be done. There was a growing desire for a "more perfect" union than the Articles of Confederation provided; but there was no desire for unity, that is, for the creation of a single unified government like that of England or France.

Affinity  
and sen-  
timent.

On the other hand, despite these favorable motives and forces, there were great and real obstacles in the convention's way. The northern and southern states were already becoming quite unlike in their economic and social interests. In every state the local patriotism was intense. There was everywhere a dread of "supreme" authority. The masses of the people felt that all good government must come from within, not from without, from below, not from above. The very distances which separated the states one from another, the absence of good roads, the infrequency with which men travelled from one part of the country to the other—all these things helped to accentuate provincialism. Liberty had been won; equality there always had been; but of fraternity there was little or none at all. Georgia and Massa-

Obstacles  
to its suc-  
cess.



chusetts, for example, had much in common, but among their people there was no full realization of it. Taking it all in all, however, it was the fundamental affinity and sentiment that counted; the suspicions and jealousies of the states did not, in the end, prove to be so serious as might have been expected.

Organiza-  
tion of the  
convention.

The convention was summoned to meet on the second Monday in May, 1787, but when that date arrived many of the delegates had not reached Philadelphia and more than a fortnight was lost in getting started. In those days there seems to have been no such thing as punctuality in public affairs. At length, a sufficient number being on hand, the convention unanimously chose Washington as its president, decided that its deliberations should be secret, and plunged right into its work. The meetings were held in the old brick State House in Philadelphia, the building in which the Declaration of Independence had been signed, but not in the same room.<sup>1</sup>

Who com-  
posed it?

Who were the men assembled here to wrestle with the problem of welding thirteen restless and sensitive communities into a strong nation? There is a popular notion that they embodied most of the wisdom and resourcefulness in the land, that the Fathers of the Republic formed a galaxy of Solons and Ciceros. Jefferson once spoke of them as an "assembly of demi-gods." In truth, however, and very fortunately, that was not the case. The convention of 1787 was a gathering of very diverse types. It contained many men of great political wisdom. It also included in its membership some men whom nature had endowed with neither ability nor good temper, as the proceedings disclose. All that can truly be said of the convention's make-up is that it

<sup>1</sup>The convention appointed a secretary, but he proved to be no paragon of secretarial efficiency. He kept a journal of the proceedings which turned out to be nothing but a skeleton of formal motions and votes. If we had to depend on this journal alone we would know very little of what went on in the convention from day to day. But James Madison, one of the leading delegates, wrote a personal diary of the proceedings, which proved to be of the highest interest and value. Several editions of Madison's *Debates in the Federal Convention* have been published. Thirty years ago the State Department began the publication of a *Documentary History of the Constitution* (5 vols. Washington, 1894-1905). This contains the secretary's *Journal* and a great deal of other material. The *Records of the Federal Convention of 1787*, by Max Farrand (3 vols., New Haven, 1911), affords the most convenient source for a careful study of the convention's work. The same author's *Framing of the Constitution of the United States* (New Haven, 1913), gives an excellent summary of the larger compilation. Mention should also be made of Edward Elliott's *Biographical Study of the Constitution* (N. Y., 1910).



included men of widely different ability, temperament, and experience; and therein lay its real strength. It contained, as has been so often pointed out, a few men of rare political genius, such as George Washington, Alexander Hamilton, Benjamin Franklin, and James Madison; likewise some exceedingly cautious men, such as Gouverneur Morris, James Wilson, John Dickinson, Robert Morris, and Roger Sherman; some thoroughly well-meaning men of moderate ability, such as William Paterson, John Rutledge, and the two Pinckneys, some cynics and doubters like Lansing and Yates; a few long-winded obstructionists, like Luther Martin, who did little but throw sand in the wheels; and a number of others who rarely had much to say but who listened attentively and voted right when important issues arose. The men in this last group were the ones whom William Pierce in a pen-picture of his fellow delegates termed the "respectable characters" of the convention, and they formed the majority.<sup>1</sup>

Those who are familiar with the post-Revolutionary epoch of American history will have noted that the foregoing list omits the names of several well-known leaders. Thomas Jefferson was not a delegate; he was in France on a diplomatic mission. But Madison kept him informed of what was going on, and in general he approved. Patrick Henry was not a member of the convention; he had an opportunity to be one of the Virginia delegation but declined.<sup>2</sup> Neither was John Hancock nor Samuel Adams of Massachusetts there, nor John Marshall, the great expounder of constitutional doctrine in later days.

The  
absent  
notables.

There were fifty-five men in the constitutional convention representing twelve states. Pennsylvania sent her full quota of seven; while New York, on the other hand, sent only three, and these were absent a large part of the time. More than half the delegates were college graduates; a majority of them had held public offices of one sort or another, some of them posts of high importance. Lawyers were in the majority. Not a few delegates were men of large business interests, while others were in modest worldly circumstances. It is significant that there was not a

Variety of  
the opin-  
ions and  
interests  
represented.

<sup>1</sup> William Pierce of the Georgia delegation diverted some of his time from the serious work of the convention to write and leave for posterity an interesting though somewhat facetious sketch of his colleagues. It is printed in the *American Historical Review*, iii, pp. 310-334.

<sup>2</sup> He was suspicious of Madison, Hamilton, and even of Washington. There is a story, perhaps apocryphal, that when asked why he did not go to the convention, Henry laconically replied: "Because I smelt a rat."

single small farmer, frontiersman, or wage-earner among them. Nevertheless every shade of opinion and political belief was represented: from Alexander Hamilton, who would have created a thoroughly centralized and aristocratic union, to Luther Martin of Maryland, who wanted the old confederation left as it was, weaknesses and all. Its variety of ideas and attitudes, not its omniscience, was the great asset of this convention. Washington feared that the diversity of opinion was so great as to preclude any action at all. Many wiser groups of men at various times in human history have set their minds to the work of lawmaking, but never has there been a body more evenly balanced, or more willing to compromise for the sake of progress, or more intent on creating a frame of government able to meet the strain that might be put upon it.

The fact that there were a good many rich men among the framers of the constitution has in our own day given a good deal of concern to some radical minds. One distinguished student of American government, a dozen years ago, wrote a whole volume to demonstrate that the convention of 1787 contained men who owned land, men who held government bonds, men who stood to profit financially by the establishment of a strong, orderly government.<sup>1</sup> But what of it? Many of those who signed the Declaration of Independence were men of wealth; their action was in no wise influenced by that fact. The ownership of property was not considered the badge of a recreant in those days. The leaders in colonial days had been men of substance; the leaders of the Revolution came mainly from the well-to-do. And so it has been throughout the course of history. The men who wrung the great charter from King John were barons and knights, not peasants and proletarians. Should it be made a reproach to Washington that he was rich as well as resourceful, or to Franklin that he was thrifty as well as wise? Was Jefferson any less of a true democrat because he owned broad Virginian acres? If men of wealth and influence had been kept out of the convention the natural leaders of the people would have been absent; the constitution would probably have been a crude document; the people would have lacked confidence in it, and in all likelihood it would have been rejected by the states.

<sup>1</sup> Charles A. Beard, *The Economic Interpretation of the Constitution* (New York, 1913).

Rich men  
and poor  
men.

Washington presided throughout the convention's deliberations (and, by the way, he was reputed to be the wealthiest man in the country at this time). As presiding officer he felt himself debarred from a prominent part in the debates and is only once on record as actually participating; but he rendered great service in quieting the occasional storms of personal animosity, and his commanding influence was on many occasions unobtrusively exercised in the right direction. There is reason to believe that he accomplished much by conferring with individual delegates when the convention was not in session. Benjamin Franklin, who headed the Pennsylvania group, was the greatest savant of them all, but he was now eighty-one years old and his voice would no longer rise above a whisper. Nevertheless his mature judgment and his quiet optimism were steadying factors of great value. Some of the wisest suggestions came from him. In point of political genius, imagination, and eloquence, none of the delegates equalled Alexander Hamilton of New York. He was still a young man, only thirty, well educated, and with intense political convictions. He distrusted popular government and wanted the ship of state to be well ballasted. It is often said that he was at heart a monarchist, which is pressing the point too far. It is fairer to speak of him as a friend of centralized republicanism such as exists to-day in France but for which there were no precedents in his time. Hamilton, unfortunately, was absent from meetings a great deal, owing to personal business of an urgent nature, but when present he always had ideas to put forward. He was the most eloquent speaker in the convention, but his hard-headed colleagues were not much moved by eloquence. So they listened appreciatively to Hamilton's admirable diction, applauded him generously, and then proceeded to vote his proposals down. His ideas were altogether too aristocratic for the convention, so, as one of his colleagues said, "he was praised by everybody and supported by none."

Leaders of  
the conven-  
tion :  
Washing-  
ton,  
Franklin,  
and  
Hamilton.

Then there was James Madison of Virginia. He is often called the "Father of the Constitution," and if the attribute of pater-  
nity must go to some one man, he is entitled to it. Less brilliant than Hamilton, he was far more widely read, more discriminating in his opinions, less aggressive, and more patient in the advocacy of his own views. A prim little man he was, still in the middle thirties, but looking prematurely old, and

James  
Madison.

without a shred of personal magnetism. His style of writing was dry and his method of speech monotonous. But if ever a man proved that knowledge is power, Madison did it in this convention. The breadth and accuracy of his information, the perfection of his patience and poise, the inexorable drive of his logic—these things contributed to make James Madison a more influential figure at Philadelphia than Edmund Burke or Daniel Webster with all their oratorical brilliance could have been. Everyone, in the words of the chronicler Pierce, acknowledged his greatness. He was also described as “modest, quiet, neat, refined, courteous, conciliatory, and amiable.” Along with high intelligence this was a rare combination of qualities. From early days an industrious student of past politics and present history, he knew what had brought about the rise and fall of every federation from the Achaean League to his own day. In preparation for the convention he had prepared elaborate “Notes on Ancient and Modern Confederacies,” and this manuscript furnished him with ammunition for his part in the debates. His memory was prodigious; he had everything at his fingertips. No questions arose but Madison was equipped with data and precedents. From first to last he was the most influential member of the convention and he owed this to his untiring industry as a student, his unfailing readiness to work in harmony with men whose opinions differed from his own, and his unquestioned personal integrity. Much of what we now know about the proceedings of the convention is due to Madison’s methodical industry, for day by day he entered in his private journal a résumé of what went on.<sup>1</sup> The constitution as finally drafted was not a mirror of his own political ideas, but it included the things he had most strongly urged. Madison deserved well of his country, and his days were long in the land, for he outlived all the other members of the convention.<sup>2</sup>

James  
Wilson.

James Wilson of Pennsylvania also deserves a place in the hall of fame, for he ranks next to Madison as the most industrious and useful member of the convention. He was a Scotchman

<sup>1</sup> See *above*, p. 34, footnote.

<sup>2</sup> Madison was a warm admirer of his fellow-Virginian, Thomas Jefferson, by whom his political views were considerably influenced. President Roosevelt, in lecturing to my class at Harvard on one occasion, referred to Madison as “a pale copy of Jefferson.” This did not seem to me a fair characterization.



by birth and had the strength of intellect which has marked so many of his compatriots in history. He found rare delight in smashing down, with sledge-hammer blows, the arguments of his opponents. With Madison he worked shoulder to shoulder at all times, and they made a great team. Together they won many victories and it was sometimes difficult to determine which deserved the major portion of the credit.

There were others among the members whose prominence almost gave them rank as leaders. Luther Martin of Maryland was one of these, if the prolixity of his speeches in the convention may be taken as an indication of prominence.<sup>1</sup> John Dickinson and Gouverneur Morris of Pennsylvania, Roger Sherman and Oliver Ellsworth of Connecticut, Rufus King and Elbridge Gerry of Massachusetts, William Paterson of New Jersey, Edmund Randolph of Virginia, the two Pinckneys of South Carolina, were all active in the proceedings. It is hard to tell just how much real influence each exercised, for in the constitutional convention of 1787, as in all other deliberative bodies, the men most frequently on their feet were not necessarily the ones whose opinions counted heavily with their colleagues.

Other  
leaders.

While the convention contained men of all ages, from Dayton of New Jersey, who was only twenty-seven, to Franklin, who was almost eighty-two, one is impressed with the fact that much of the best work was done by the younger members. James Madison, who contributed most to the daily labors, was thirty-six; Alexander Hamilton, who made the greatest single argument of the whole summer, was only thirty; and Gouverneur Morris, who put the fine finishing touches to the document, was just thirty-five. Edmund Randolph was thirty-four, and Charles Pinckney, twenty-nine. At least a dozen other members were still below the meridian of forty-five. The constitution, accordingly, reflected the zeal and optimism of relatively young men, chastened to moderation by the mature judgment of their older colleagues. The convention was not a gathering of nestors or elder statesmen. Much youthful courage was gathered within these four walls during the summer of 1787, but there was also enough conservatism to keep it in bounds.

A body of  
young men.

The convention was strong in men of practical experience.

<sup>1</sup> On one occasion he spoke for the better part of two whole days, and hot days at that.

But the delegates were men of experience.

It contained a substantial quota of delegates who had served in the Continental Congress or the Congress of the Confederation, or who had helped to frame the constitutions of their respective states, or who had been governors, or state officers, or members of state legislatures. Very few delegates were without political experience of one sort or another. This was a great asset. It kept the convention from wasting many precious hours in the discussion of political theories. The convention put its feet on the ground and kept them there. The combination of idealism and practical politics was reflected to good advantage in all its work. There were occasional references to the political theories of Grotius, Locke, and Montesquieu; but there were far more frequent allusions to the actual experience of Maryland or Massachusetts. John Dickinson expressed the convention's point of view when he said: "Experience must be our guide; reason may mislead us."

The procedure.

In organizing, the convention adopted its own rules. On all questions the vote was taken by states, each state having one vote. The delegates, as has been said, were pledged to secrecy, and this was a wise move, for if the subsequent bitter disagreements on many points among the members had been known to the world, the constitution would probably never have been ratified by the several states. It was an unusually hot summer but sessions were held almost every week-day from May to September. Matters were often referred to committees, but all the vital questions were threshed out on the floor by the whole convention. Those who glance through Madison's journal will be impressed with the way in which things were discussed for a while, then laid over, then taken up again, voted upon, reopened, reconsidered, and dealt with from every point of view.

Fundamental questions: the nature of the union.

It did not take long to discover that among the delegates there were two diametrically opposite opinions as to what the convention ought to do. Some felt that the Articles of Confederation should be used as a basis and that the convention had no authority to do more than supplement or strengthen this agreement. Others were of the opinion that the articles were hopelessly inadequate, that revising them would be a waste of time, and that the convention should simply throw them aside and begin anew. Even before the meetings commenced, in fact, James Madison, with the help of his Virginia colleagues, had

prepared a new scheme which disregarded the articles altogether, and this was at once laid before the convention by Edmund Randolph of Virginia. Known as the Randolph plan, it proposed a real federal union, with a central executive, legislature, and judiciary, with independent taxing powers and with authority to make its mandates fall directly upon the individual citizen, not merely upon the states. The federal Congress, under this plan, was to be made up of representatives from the several states in proportion to the number of "free inhabitants" in each, or in proportion to their respective tax contributions.<sup>1</sup> Virginia would thus have fifteen or sixteen representatives, while Georgia, Delaware, or New Jersey would each have only two or three. The federal Congress, according to the Randolph plan was to have a veto on laws passed by the legislatures of the several states. Its own acts were to be subject to review by a council of revision which was to consist of certain executive and judicial officers.

The Randolph plan.

The opponents of the Randolph plan were slow in organizing and it was not until the middle of June that William Paterson of New Jersey, on behalf of the small states, brought forward a wholly different scheme.<sup>2</sup> This plan contemplated the continuance of a congress on substantially the same lines as that of the Confederation—a single chamber with each state having one vote but with the addition of an executive in the form of a council chosen by the congress and with provision for a federal judiciary. The Paterson plan also provided for a federal revenue by proposing that the congress be given the power to levy duties and excise taxes, and it authorized the federal government to use force, if necessary, to compel the states to fulfil their obligations. The adoption of this plan would have necessitated no new

The Paterson plan.

<sup>1</sup> There were to be two Houses in this Congress, the lower elected by the people, the upper House chosen by the lower from a panel of names submitted by the various state legislatures.

<sup>2</sup> An alternative plan was also laid before the convention by Charles Pinckney of South Carolina. Just what this plan contemplated we do not know, for there is a good deal of doubt whether the document which has been published as the "Pinckney Plan" (*American Historical Review*, Vol. ix, pp. 741-747, July, 1904) is authentic. At any rate it was never seriously considered by the convention. Alexander Hamilton also outlined his ideas but not in a detailed plan. He urged a national government so highly centralized that very little power would have been left with the states. This proposal found no support; it was not even referred, like the Randolph, Pinckney and Paterson plans, to the committee of the whole.



constitution. A few amendments to the Articles of Confederation would have sufficed.

Could these  
two plans  
be  
reconciled?

Each of these two plans obtained an almost equal numerical support among the states represented in the convention, the larger states for obvious reasons siding with Virginia, while the smaller states, from equally plain motives of self-interest, ranged up with New Jersey. For weeks the convention debated the merits and faults of each proposal. One group of delegates pointed out the unfairness of giving to the states which would pay most of the taxes no more representation than those which would contribute little. The other group stood firm on the point that to depart from the old doctrine of the equality of all the states, large and small, would be the first step toward the ultimate servitude of the small commonwealths. There was no more reason, said a delegate from one of the small states, for giving a large state more votes than a small one than there was for giving a big man more votes than a little man. The appeals, after all, were not to reason but to self-interest and sometimes the debate grew acrimonious. The fundamental trouble was that some states were large and some small; while all were sovereign and independent. They had adopted the doctrine of common equality as a makeshift at the outset of the war; now the small states held to it as their unalienable right. For a time it seemed as though the convention would split its keel on this rock. But there were enough practical politicians among its members and in the end a solution was found through the door of compromise.

The Connecticut  
compromise.

This solution is commonly known as the Connecticut compromise, because it was brought forth in its final form by the delegates of that middle-sized state, although it is believed to have sprung from the fertile intellect of Benjamin Franklin.<sup>1</sup> In brief, it provided that in the proposed federal congress the upper House should be based on the equal representation of the states, while the lower House should represent the several states in proportion to their respective populations, with the additional proviso that all bills for raising revenue should originate in the lower House. Before the delegates from the larger states agreed

<sup>1</sup> It was introduced by William Samuel Johnson, a Connecticut delegate who otherwise did not take a prominent part in the debates. A jurist of considerable repute, he had received an LL.D. from Oxford, and on the floor of the convention he was always respectfully addressed as "Doctor" Johnson.



to this arrangement, however, they had made certain of achieving their own aims as respects the status of the new federal government. The Connecticut compromise, so-called, was not accepted by them until after the convention had decided that the new federal government, unlike the government of the Confederation, should exert its powers directly upon the individual citizen, through its own laws, officials, and courts. The advocates of a strong central government, who came chiefly from the larger states, were in control of the convention and could afford to make some concessions. At any rate the Connecticut compromise cleared the air and removed the most serious stumbling-block that the delegates encountered.

These fundamental questions out of the way, the convention began to make better progress. But presently another source of friction and disagreement was encountered. The Connecticut compromise had provided that representatives in the lower House of the new Congress should be apportioned among the several states on a basis of population. But in counting the population of a state, were the slaves to be counted or left out? Nothing had been said about that point. The delegates from South Carolina were particularly insistent that the term "population" should be taken to include all inhabitants whether bond or free, black or white. One of the Massachusetts delegates retorted angrily that if such chattels as slaves were counted in the South, other such chattels as horses and mules should be counted in the North. The states opposed to the counting of slaves were in the majority and could have had their way by boldly asserting it; but, after a discussion which made the sparks of animosity fly in showers, they chose to meet the others halfway or rather more than halfway. The outcome was an agreement that slaves should be counted in determining the quota of representation from each state, but at three-fifths of their numerical strength only. In other words a hundred slaves were to be counted, for purposes of representation in Congress, as the equivalent of sixty free men. Direct taxes, if levied upon the several states, were to be apportioned on this same basis.

There was no logic in this solution except possibly the logic of an awkward situation. A convention of political philosophers would never have agreed to it. If slaves were deemed to be citizens, they should have been counted, head for head, at full

The  
"three-  
fifths"  
provision.

Illogical  
nature  
of this  
arrange-  
ment.

value; if they were deemed to be chattels, they should not have been counted at all. The three-fifths provision could not be defended except on the hypothesis that slaves were neither one thing nor the other. Illogical as it was, however, this clause is really a tribute to the sound political sense of the convention. It showed that there were practical politicians at work on the new frame of government, men who were ready to divorce themselves from logic or theory if by so doing they could bring the states into working harmony and thus get a strong union established.<sup>1</sup>

Other  
difficulties.

But there were other questions connected with slavery. Every one agreed that the new federal government should be given some power to regulate foreign commerce. The absence of such authority in central hands had been a glaring weakness under the Articles of Confederation. To what extent, however, and subject to what limitations, should this power be given to the new Congress? This was a perplexing question. If Congress should be given unrestricted power, it might levy duties not only on imports but upon the great exports of tobacco, cotton, rice, and indigo, which the southern states were shipping to Europe. Quite possibly, indeed, the populous northern states, like Pennsylvania, New York, and Massachusetts, might, by their superior representation in the new Congress, try to make the duties on southern exports furnish the bulk of the national revenue. And what about the trade in slaves? Slaves were still being brought from the coasts of Africa in large numbers, and the slave-owning states felt that the new Congress should not have power, under color of regulating trade, to shut down upon these importations of slaves or to tax them too heavily. On the other hand, there were delegates in the convention, even from the South, who openly expressed their longing for the day when this brutal and infernal traffic would come to an end. The most bitter of all the attacks on the slave trade came from the lips of a Virginia delegate. Slavery had not yet become a strictly sectional issue, but it was beginning to forecast its possibilities for future trouble.

<sup>1</sup> An arrangement of this sort had been under discussion, with reference to the apportionment of contributions among the states, even before the convention met. The three-fifths ratio is to be found in an amendment proposed to the Articles of Confederation in 1783, and this amendment had been ratified by eleven states prior to 1787.

Mutual concessions once more enabled the convention to attain a meeting of minds. It was agreed that Congress should have full liberty to tax imports but should be forbidden to tax exports; furthermore, that it should not be allowed to shut off the importation of slaves until the year 1808. Meanwhile, it might levy a tax, not exceeding ten dollars per head, on all slaves brought in. Under this arrangement slaves continued to come for twenty years after the constitution went into force, but when this time-limit expired, Congress promptly forbade further importations. Thereafter the South had to depend upon the natural increase of its slave population. In the meantime, however, slavery gained an almost unshakable hold upon the economic system of these southern communities. What the loosening of this iron grip would ultimately cost the nation the framers of the compromise could not have foreseen; but of all the compromises of the constitution, this was the most heavily paid for in the end.

The commerce-and-slave-trade provisions.

Various other questions had to be settled before the convention's work was finished, and some of them made heavy demands upon the time and patience of the members. The proper position and powers of the chief executive was one of these. The Confederation had no separate executive; its congress possessed both executive and legislative powers and handled its executive functions through its own committees or through officers whom it appointed. But this system of carrying on the executive work of government proved altogether unsatisfactory. It was inefficient in war and cumbersome in peace. Hence arose the idea of making a place in the new constitution for a powerful and independent executive in the person of a President who would have dignity and authority in keeping with his position as the first citizen of a great nation. On the other hand the delegates felt concerned lest the President's powers be made too broad, thus giving him at some future time the opportunity to become a virtual dictator with a more agreeable name.

The problem of the executive.

Much time was spent, therefore, in discussing how the President should be chosen, how long he should serve, what powers he should have, and how he should be held in check. There was great diversity of opinion on all these points and a special committee worked hard to find a satisfactory solution. Eventually, as everyone knows, the convention adopted the plan of having the President chosen by an electoral college, thus making him

The compromise on this point.



independent of Congress.<sup>1</sup> As a weapon of self-defence, moreover, they gave him the power of veto. Likewise they placed in his hands great authority with respect to the making of appointments and the negotiating of treaties with foreign states. But, they also hedged the presidential office with stern restrictions. A plan of removal by impeachment was provided; executive appointments were made subject to confirmation by the Senate, and a two-thirds vote of this body was made necessary for the ratification of treaties negotiated. The convention, in short, gave with one hand and took away with the other.

Many other problems had to be worked over patiently. There were a dozen other compromises, big and little. The convention, to use Benjamin Franklin's metaphor, spent a great deal of its time sawing boards to make them fit. The constitution is full of sawed-off provisions. Take the congressional term, for example. Some wanted congressmen elected annually; others urged a three-year term. In the end they split the difference and made it two years.

But all this should not obscure the fact that the constitution embodies a series of unanimous agreements as well as a series of compromises. Text books have paid too little attention to one, too much to the other. Take the most important section of the constitution, the one that sets forth the "eighteen powers of Congress."<sup>2</sup> On at least fifteen of these powers there was no serious disagreement at all. So it was with the limitations which the constitution places upon Congress, and on the states. When you say that the constitution is a "bundle of compromises" you are right; but you are equally right if you call it a bundle of unanimous agreements.

The convention did much of its work in committee of the whole,—debating, enlarging, amending, and adopting a series of resolutions which grew out of the Randolph plan. These resolutions, in due course, were referred to a committee of detail, which

<sup>1</sup> This was, in fact, one of the "great compromises" of the constitution, although it has rarely been so designated. The provision for an electoral college, based primarily on population, was a victory for the large states. It gave them a controlling voice in the choice of a President. But the provision for the election of the President by the House of Representatives, in case the electoral college should fail to poll a clear majority for some one candidate, was a concession to the smaller states. For be it noted that when the election of a President goes to the House of Representatives the vote is *by states*, and not by individuals—each state having one vote.

<sup>2</sup> Article I, Section 8.

The  
agreements  
of the  
convention.

Putting  
on the  
final  
touches.



put them into semi-final form. Then they were gone over again by the convention and after more alterations the document was ready for a committee of revision. Gouverneur Morris, as chairman of this committee, was charged with the work of putting the provisions into terse and forceful English. How admirably he performed this task even a rapid reading of the document will disclose. For conciseness and lucidity the Constitution of the United States still stands without a peer among the constitutions of all countries.

On September 17, 1787, the final draft was ready and it was signed by thirty-nine members of the convention. Of the others, some were absent; some refused to sign. But there was no hard feeling. The delegates took dinner together at the City Tavern, bade each other good-bye, and started for their homes. The constitution was then sent to the Congress of the Confederation with the request that copies be transmitted to the legislatures of the several states, to be by them submitted for ratification to state conventions elected by the people.

By dint of unmeasured patience the constitution had been framed, but an even more difficult task was still ahead, that of getting the states to accept it. No one dared to hope that all the states would agree, hence it was provided by the convention that if nine states gave their adhesion, the new constitution would go into force. There were serious doubts, indeed, whether even nine states would concur. The members of the convention were themselves far from being enthusiastic over the product of their summer's labor. Not one of the thirty-nine who signed the constitution regarded the document with whole-hearted approval. Alexander Hamilton, for example, gave his signature gladly, but in doing so took occasion to remind the convention that no man's opinions were more remote from the new constitution than his own. He was ready to accept it because in his opinion no plan of government could be much worse than that provided by the Articles of Confederation. Benjamin Franklin also had misgivings; but after remarking that the experience of fourscore years had taught him to doubt the infallibility of his own judgment, he placed his name at the head of the Pennsylvania delegation. So it was with Madison, the man who had done most to bring things to an auspicious end. The new constitution as finally drafted was a long way from being a true reflection of his

Signing  
the  
Constitu-  
tion.

The next  
great ques-  
tion:  
Would the  
states  
accept it?

clean-cut opinions, but he was ready to shoulder his share of responsibility for it before the people. Some men of inflexible convictions, among them Edmund Randolph of Virginia and Elbridge Gerry of Massachusetts, were so disappointed with the compromise character of the document that they would not sign at all.

As the convention had met behind closed doors no inkling of what the delegates were doing reached the people till everything was done. In lieu of actual information from within the brick walls, however, the newspapers circulated all sorts of gossip as to what was under consideration. Many of these rumors were wild, but even the wildest among them found some believers. Not a few honest men in all sections of the land were convinced that a monarchy was being hatched at Philadelphia. When the constitution was finally made public, it contained, of course, many surprises. Some people protested that the convention had exceeded its authority because it had been called to revise the Articles of Confederation and had possessed no right to draft a new constitution. Others pointed out that the Articles of Confederation had been ratified by the state legislatures and that these articles ought not to be supplanted except by action of the same legislatures. Who gave these delegates at Philadelphia the right to say that their new constitution should go into effect when approved "by conventions" called in nine states out of the thirteen? They had been given no such right; they had merely assumed it. Some thought the new constitution made the central government too strong; others that it did not make the central government strong enough.<sup>1</sup>

From all quarters, again, came the serious and well-founded criticism that the constitution contained no bill of rights, no guarantees for freedom of the press, freedom of speech, religious liberty, and so forth, such as had been incorporated in most of the state constitutions. Thomas Jefferson, for example, regarded this omission as the chief defect in the convention's work. Some grumbled because the constitution gave the new federal government power to issue paper money; others because it took that right away from the states. Many good people stigmatized the

<sup>1</sup> In Paul Leicester Ford's *Pamphlets on the Constitution of the United States* (Brooklyn, 1888) will be found a collection of criticisms issued by various contemporary opponents of the constitution.

How the  
new consti-  
tution was  
received  
by public  
opinion,

The  
fault-  
finders

document as sacrilegious because it contained no mention of the Deity and did not even require that office-holders should be Christians. In the North there was a feeling that the compromise with slavery went too far; in the South it was regarded as not having gone far enough. The fault-finders were numerous, and among them were many influential men, including some who had been members of the convention.

The Congress of the Confederation, after some delay and hesitation, sent copies of the constitution to the legislatures of the several states. In no case did these legislatures submit the question to a direct popular vote. All of them followed the suggestion that the people be asked to elect delegates to state conventions which should by majority vote decide the matter. Conventions in Delaware, Pennsylvania, and New Jersey were called and accepted the constitution almost at once; Georgia followed after a few weeks. Then serious obstacles began to appear in some of the larger states: Massachusetts, New York, and Virginia. In these the campaign of opposition became very bitter; an avalanche of criticism was let loose in broadsides, pamphlets, and letters to the newspapers. Personal attacks were launched against the leading men of the convention, and even Washington did not escape the flood of invective. Appeals to class prejudice began to convulse the land. The small farmers and frontiersmen were roused by the allegation that the whole thing was a conspiracy to deliver the country into the hands of the well-to-do. From Georgia to New Hampshire the states seethed with political discussion, not always good tempered. There seemed to be truth in Franklin's remark that the United States had become a "nation of politicians."

The struggle for ratification in the various states.

The danger was not merely that fewer than nine states would accept the constitution, but that the refusal of one or two of the largest states might, by reason of their geographical situation and economic importance, practically nullify the whole affair. There was New York, for example, where popular feeling seemed to be running most strongly against the constitution. If New York should refuse its adhesion, the assent of all the others would not insure the success of the new federation. It would be (to use a contemporary metaphor) a League of Nations with the most essential member left out. Geographically New York lay right athwart the country. Four states were to the north of her and

The danger in New York.

eight to the south. No union could be solid without New York. Yet in the closing days of 1787 it was apparent that if the question of ratifying the constitution were submitted to the people of New York, it would be overwhelmingly rejected. Propaganda against the constitution was doing its work. The most immediate need, therefore, was for a campaign of counter-propaganda, or a campaign of education,<sup>1</sup> which would focus the attention of the people, both in New York and elsewhere, upon the merits of the constitution itself, not upon the failings of the men who had framed it.

The  
campaign  
of educa-  
tion.

Such a campaign of education was accordingly planned by Alexander Hamilton, who enlisted for the work the coöperation of James Madison and John Jay. During the winter and spring of 1787-1788, these three wrote a series of letters which were printed, sometimes three or four letters a week, in various New York newspapers. The letters were designed to show how necessary some plan of federal union had become to the several states and to demonstrate, point by point, that the new constitution offered the best practicable solution of all the difficult problems involved. Each letter dealt with some phase of the subject in logical order, explaining, defending, and appealing to the patriotism of the people. All bore the common signature "Publius," and the individual authorship of several of them cannot be definitely determined, but it is beyond doubt that the great majority were the work of Hamilton and Madison.

Value  
of the  
"Publius"  
letters.

Although these newspapers expositions of the new constitution were written under pressure and as campaign polemics, they set a high standard both in substance and in style. Brushing aside all personalities, all appeals to passion or to sectional prejudice, they went right to the heart of every constitutional question. They were the work of men who were brimful of their subject and who knew, better than any others of their time, just what the provisions of the new constitution expressed or implied. Naturally these arguments exerted a great influence upon the public mind, and particularly upon the minds of those who came to the state conventions without any clear understanding of what powers the new constitution conveyed to the central govern-

<sup>1</sup>The difference between "propaganda" and "a campaign of education" is all in the point of view. When you disapprove it you use one term, when you approve it, the other.



ment and what imitations it imposed. Had it not been for this vigorous publicity campaign, there is every reason to believe that New York would have rejected the constitution. Even as it was that state was one of the last to ratify, and even then its action was taken by a narrow majority of only three votes in the state convention.

Even before all the letters had appeared in the newspapers they were collected and printed in book form under the title of *The Federalist*. In that shape they have come down to us, and remain to-day the best contemporary exposition of what the constitution meant to the men who made it.<sup>1</sup> For keenness of analysis, cogency in the statement of arguments, adroitness in reply to critics, and brilliancy of style this volume has stood unrivalled in the field of American political literature for one hundred and thirty years. Seldom is it given to any treatise in political science to hold its place of supremacy so long. True enough, the book is not a trustworthy guide for those who want to know what the various provisions of the American constitution express or imply to-day. In the years since these letters were written nineteen amendments have been added; the courts have interpreted many clauses in a way which the framers of the constitution could never have foreseen, while a legion of political customs and usages, forming an unwritten constitution as it were, have grown up around the original frame of national government. Time has wrought great changes. But as a treatise on the principles of federal government and "the political ideals of the Fathers," there is nothing that approaches in value these campaign letters of Hamilton, Madison, and Jay.

While it is impossible to tell with certainty what would have happened had the constitution been submitted for acceptance to the direct vote of the people in the various states, there is every reason to think that it would have been rejected. At the hands of conventions it had a far better chance of ratification because in none of the states save New York were the delegates to these conventions chosen on a basis of manhood suffrage. In all the remaining states there were property or other qualifications for voting, and the propertied classes were, on the whole, favorably disposed towards the constitution. They felt that nothing but a

*The  
Federalist.*

A classic  
of political  
science.

Other in-  
fluences  
responsible  
for the  
adoption of  
the consti-  
tution by  
the states.

Attitude of  
the propertied  
classes.

<sup>1</sup> There are many editions of *The Federalist*, but the best for most purposes is Paul Leicester Ford's edition (N. Y., 1898).

strong central government could stem the drift to anarchy. In the various state conventions, moreover, it was the delegates from the towns, the representatives of the mercantile and trading classes, who lined up most strongly in favor of ratification. The constitution drew its chief support from the well-to-do, the professional men (including the clergy), the plantation-owners at the South, the merchants and ship-owners, the men of education, —in a word from that part of the population which lived in the better-settled parts near the seacoast. Its strength lay along the arteries of trade, the shore line, the Connecticut river, and the valley of the Shenandoah. Its backers had a great advantage in that they controlled most of the wealth and brains of the country. In the words of Woodrow Wilson it commanded the unswerving support of "a strong and intelligent class, possessed of unity, and informed by a conscious solidarity of material interest."

Where the  
opposition  
came from.

The opposition, on the other hand, came principally from the interior and sparsely settled areas, from the struggling farmers and pioneers who wanted cheap money issued by the states, who looked upon the merchants as profiteers, and who were in no mood to do anything that would redound to the benefit of the towns.<sup>1</sup> But it should not be assumed that all the men of brains and leadership were in favor of the constitution. Patrick Henry, Richard Henry Lee, Edmund Randolph, George Clinton, and Elbridge Gerry were all against it. Curiously enough, by the way, the last two became Vice Presidents under the constitution they opposed.

A charge  
frequently  
made  
to-day.

The constitution eventually gained ratification but it was not carried along on any tidal wave of popular enthusiasm. Its supporters did not make their chief appeal by extolling the democratic features of the document; on the contrary, they tried to show that it would establish a safe government, a well-balanced government, a government able to maintain order within and security without, a government which would insure economic prosperity. In our own time we are often told that the constitution of the United States is a reactionary document, framed in secret conclave by men who had no faith in popular government,

<sup>1</sup> For further information on this important point see O. G. Libby, *The Geographical Distribution of the Vote . . . on the Federal Constitution* (Madison, 1894) and C. A. Beard's *Economic Interpretation of the Constitution* (N. Y., 1913).

and who feared to trust the people with political power. That statement is in part true; in part false.

The constitution was framed and adopted at a time when business conditions were bad and the national outlook unpromising. The country was wallowing in that trough of depression that seems the inevitable aftermath of war. The Fathers were practical men; their eyes were not closed to what was going on. They tried to devise a workable document, which would meet an emergency at once and which could be adapted to the needs of the future. Quite naturally the constitution was not so completely imbued with ultra-democratic principles as would have been a fundamental law framed ten years before, by the men who signed the Declaration of Independence, for example. It was not the sort of document that Daniel Shays or Patrick Henry would have drawn. And of course it does not suit the Shays and Henrys of to-day. Only six of the fifty-six who signed the Declaration had a hand in making the constitution.

How far  
is it true?

The framers of the constitution had to keep constantly in mind, moreover, the fact that their work must go before the representatives of the people, and that whatever theories of government individual members of the convention may have held, these could not safely be given free play. The new constitution, unless it carried an appeal to the educated and well-to-do, would not have had the slightest chance of being adopted. The small farmers and backwoodsmen were sure to view with suspicion and oppose anything that the men of the convention might do. If the constitution had been submitted in 1787 with provisions which many people nowadays would like to see incorporated in its pages, it would never have become a constitution at all.

Be it undemocratic or otherwise to the eyes of the twentieth century radical, this constitution was, in any event, the most democratic achievement of all the centuries down to its day. No leading nation of Europe in 1787 had a written constitution of any sort; nor, with the single exception of England, did any have even the forms of popular government. The new constitution provided a scheme of government which was much more democratic than that which England possessed at the time and far more democratic than that which any land had ever possessed at any previous time.

The original constitution of the United States, like any other



The real  
test.

product of human hands, must be judged in the light of its own day, which was a day with scarcely a glimmer to lighten the darkness of political despotism in all parts of the world. Let it be remembered, again, that this document, as has been well said, was the expression not only of political faith but of political fears. Its framers desired to establish a government which would be a bulwark of popular liberty; but they also wanted one that would defend the nation's borders, keep peace within the land, and pass its blessings on to posterity. Let posterity now declare whether it has succeeded in passing these blessings on!

The  
Fathers of  
the Re-  
public.

They established, in any event, a nation which has shown itself able to preserve democracy at home and to fight for it abroad. They inaugurated the world's greatest and most successful experiment in federal republicanism. They created a union that has endured. They deserve all the fame and gratitude that history has given them. "Leaders of the people by their counsels, wise and eloquent in their instructions, all these were honored in their generations and were the glory of their times. . . . With their seed shall continually remain a good inheritance, and their children are within the covenant. . . . Their glory shall not be blotted out. . . . Their bodies are buried in peace, but their name liveth forevermore."<sup>1</sup>

The con-  
stitution  
finally  
ratified.

But to return to the final ratification. It will be recalled that the constitution was to go into force whenever nine states should have accepted it. By midsummer of 1788 the necessary nine had been secured; the others drifted in one by one. North Carolina did not give assent till the autumn of 1789, however, and Rhode Island delayed ratification until the spring of 1790.

The new  
federal  
government  
installed.

The Congress of the Confederation, which had prolonged a lingering existence during all these turmoils, now issued a call to the various states to choose presidential electors, senators, and congressmen; likewise it designated New York as the temporary seat of the new government, and then it went out of existence. Ten states responded by choosing electors, and these electors in due course chose Washington as President and John Adams as Vice-President of the Union. Likewise, they each chose their quota of senators and representatives in the way prescribed. The new government took office on April 30, 1789.

<sup>1</sup> *Ecclesiasticus* (Apocrypha) 44: 4-13.



## CHAPTER IV

### "THE SUPREME LAW OF THE LAND"

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.—*Article VI, Paragraph 2.*

The constitution of the United States, to use its own words, is "the supreme law of the land." It is a short document, as constitutions go, and more concise than the constitution of any other nation or of any among the forty-eight states of the union. Therein it satisfies the first of the requirements once stipulated by Napoleon Bonaparte, that a good constitution should be "short and obscure." To read it through takes about twenty minutes. But it is very far from being an obscure document; on the contrary it is a model of straightforwardness and clarity. As Lord Bryce says, it ranks above every other written constitution for simplicity, brevity, and the precision of its language. Gouverneur Morris, who put the finishing touches to it, wrote with a cogency that few men have ever surpassed.

In arrangement the constitution consists of a preamble and seven articles of unequal length, to which nineteen amendments have since been added. The three longest articles deal respectively with the legislative, the executive, and the judicial organs of government; the others with miscellaneous matters, such as interstate relations, the admission of new states, the methods of amendment, and the arrangements for its own ratification. Finally, come the amendments which are not inserted as interlineations (as is the case in some European countries), but are tacked to the end of the original text. Looking at the provisions of the constitution as a whole, certain features stand out prominently, and these will be briefly recapitulated.<sup>1</sup>

General  
arrange-  
ment  
of the con-  
stitution.

<sup>1</sup>The fundamental principles of the American constitution have been expounded at great length by many able writers. Joseph Story's *Com-*

1. The constitution is a grant of powers.

In the first place the constitution is a grant of powers. It emanated from states which desired union but not unity. To that end they gave over, by mutual consent, certain powers which had hitherto been included in their own fields of jurisdiction. They created a new government, endowed it with definite rights, and made it sovereign within its own sphere. But the new federal government received only such powers as were expressly or by reasonable implication conveyed to it by the specific provisions of the constitution. All other authority was reserved to the states themselves, and any occasion for doubt on that point was speedily set at rest by the tenth amendment.<sup>1</sup> The proper allocation of powers to the Union and the states respectively was a matter of supreme importance, for upon this more than upon all else the success of the new constitution would ultimately depend. Yet on this point the framers of the constitution had little or nothing to guide them.

A balanced adjustment of authority.

There had been federal governments in other countries before 1787, but their history had been one of failure, partial or complete. Either the federal government had in each case received too little power and hence had perished from general debility, or it had been allowed so much authority that it proved able to crush out all the rest. The Fathers strove to guard against both these dangers. They gave large powers to the new federal government, but not too large. They tried to assure it a reasonable revenue, but did not give it unlimited power to tax; they gave it power to borrow; they empowered it to regulate foreign and interstate commerce, to provide an army and navy, to establish and maintain a postal service, and to do various other things

*mentaries on the Constitution* (5th ed., 2 vols., Boston, 1891) contains what may well be termed the classic exposition. W. W. Willoughby's *Constitutional Law of the United States* (2 vols., N. Y., 1910) is less philosophical and far more closely in touch with the conditions of to-day. Another well-known commentary, J. I. C. Hare's *American Constitutional Law* (2 vols., Boston, 1889), includes an able treatment of some difficult constitutional questions, and mention should also be made of Roger Foster's *Commentaries on the Constitution of the United States*, of which only the first volume was issued (Boston, 1895). John R. Tucker's *Constitution of the United States* (2 vols., Chicago, 1899) gives the Southern point of view on controverted questions. Among the smaller manuals the most useful are W. W. Willoughby's *Constitutional Law* (N. Y., 1912), Charles K. Burdick's *Law of the American Constitution* (New York, 1922), and Emlin McClain's *Constitutional Law in the United States* (N. Y., 1905).

<sup>1</sup> "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

which the common welfare of all the states seemed to demand.<sup>1</sup> But on the other hand they reserved to the states the whole field of civil and criminal law, the regulation of trade within their own bounds, the "police power," in short the entire residuum of governmental powers.

It has sometimes been written in text books that the framers of the constitution tried to give all powers "of a general nature" to the central government, reserving all "local" powers to the states. But that is not what they tried to do. They were governed by no theory as to how powers *ought* to be apportioned in a federalism. What they were after was to correct the glaring defects in the Confederation as it then existed. They therefore gave to the new central government those powers which the Congress of the Confederation ought to have had but did not. This is the proper approach to the convention's work in allocating powers. Study the Articles of Confederation and put your finger on the flaws. You will find that most of the eighteen powers given to the new federal government are directly related to these weaknesses and omissions. The convention gave the new federal government no powers on the mere theory that it ought to have them as a matter of principle or logic.

A mis-  
taken  
idea.

Here are the chief powers given by the constitution to the federal government and alongside them are placed some of the most important things which, by the silence of the constitution, are left largely or wholly to the jurisdiction of the several states:

The  
powers in  
detail.

## FEDERAL POWERS

1. Taxation for federal purposes.
2. Borrowing on the nation's credit.
3. Regulation of foreign and interstate commerce.
4. Currency and coinage.
5. Foreign relations and treaties.
6. Army and navy.
7. Postal service.
8. Patents and copyrights.
9. Regulation of weights and measures.
10. Admission of new states.

## STATE POWERS

1. Taxation for local purposes.
2. Borrowing on state's credit.
3. Regulation of trade within the state.
4. Civil and criminal law.
5. The "police power."
6. Education.
7. Control of local government.
8. Charities and correction.
9. Suffrage and elections.
10. Organization and control of corporations.

<sup>1</sup> On the question of "implied powers," see *below*, pp. 77-79.

Does the partitioning of governmental powers mean weak government?

Federalism, it is sometimes said, means weak government.<sup>1</sup> It distributes powers among several governments instead of concentrating them all into one strong hand. From their nature, then, federal states, whether they be monarchies or republics, are inferior in vigor and strength to centralized or unitary states. But this is not inevitably true, because inherent weakness may be more than offset by other factors which make for strength. In the United States it has not been true. The national government has developed, through its hold on the loyalty of the people, a degree of strength and stability which has served to offset the intrinsic weakness of a federal system. Whether a government will be strong or weak depends more upon the political genius of its people than upon the form of its constitution. It depends also upon the natural resources of the country, the spirit of the laws, and upon the political traditions that are developed. If a federal government proves weak, its weakness cannot always be attributed to the system alone. We must look to other sources of debility.

The perpetuation of the states.

Anomalous though it may sound, the federal government of the United States has grown steadily stronger without in any way weakening the power of the state governments. The states are far stronger to-day than they were in 1789 when Washington was inaugurated.<sup>2</sup> There were thirteen states then, there are forty-eight now. They were suspicious then; their suspicions have been allayed. They now feel so secure of their own strength that they are ready to hand over new powers to Congress, as they did by the sixteenth and eighteenth amendments. In 1787 the opponents of the constitution openly predicted that the states would be reduced to the status of provinces or satrapies, mere divisions of the nation for administrative purposes. These prophets were without honor in their own country, and they deserved to be, for history has made their mutterings look grotesque. The constitution set up a republic of republics, a commonwealth of commonwealths, and so it has remained. After the convention of 1787 had adjourned someone said to Benjamin Franklin, "Well, Doctor, have you given us a republic or a monarchy?" "A republic," replied Franklin, "if you can

<sup>1</sup> A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., N. Y., 1915), p. 167.

<sup>2</sup> For a further discussion, see Chapter xxviii, below.



keep it." We have kept it—at any rate for one hundred and thirty-seven years.

A second outstanding characteristic of the American constitution is its recognition of what has commonly been called the principle of "division of powers" or of "checks and balances," in other words the idea that the three organs of government—legislative, executive, and judicial—should be kept distinct and independent and should each act as a check on the others. The executive should never legislate nor should the legislature ever attempt to administer its own laws. The courts, again, should enforce the laws of the land but should have no hand in making them.

2. The principle of "checks and balances."

This interesting doctrine has been generally associated with a French writer, Baron Montesquieu, whose two volumes on *The Spirit of Laws* appeared about 1748. But the general idea of differentiating the functions of government is as old as Aristotle.<sup>1</sup> Montesquieu merely gave it a broader and more emphatic expression, and through his writings the leaders of political thought in America were impressed by it. Here is the doctrine in Montesquieu's own words:

Derived from Montesquieu.

"Political liberty is to be found only in moderate governments; even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits? To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. . . . In every government there are three sorts of power: the legislative, the executive. . . . and the judiciary power. . . . When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive."<sup>2</sup>

Montesquieu's own statement of the doctrine.

Montesquieu's doctrine was widely accepted by the leaders

<sup>1</sup> "All states have three elements, . . . first, that which deliberates about public affairs; second, that which is concerned with the magistrates, and determines what they should be, over whom they should exercise authority, and what should be the mode of electing them, and thirdly, that which has judicial power." Aristotle's *Politics* (Jowett's edition, 1885, Vol. i, p. 133).

<sup>2</sup> *The Spirit of Laws*, Book XI, chs. 4-6, *passim*.

His influence upon the framers of the constitution.

of public opinion in the various states during the last two decades of the eighteenth century. Virginia wrote it into her first constitution. John Adams was a firm believer in its soundness and embodied it in the constitution of Massachusetts. The most influential members of the constitutional convention of 1787 accepted it as gospel. "No political truth," wrote Madison, "is of greater intrinsic value. . . . The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>1</sup> Hence, while no express statement of Montesquieu's principle was incorporated in the national constitution, the separation therein of legislative, executive, and judicial provisions into three separate articles and the establishment of divers checks and balances prove that the doctrine was held clearly in mind.<sup>2</sup>

Reasons for this influence although his teaching was based upon a misconception.

Why should the writings of a French philosopher have had such an influence upon the structure of American government? One reason is that the doctrine seemed to fit in precisely with the experience of colonial America. The colonists had repeatedly protested against the interference of the colonial executives in the matters of legislation, and there had been many conflicts over the independence of the colonial judges. On the whole, it looked as though most of the political troubles of the colonial era had arisen from a failure to keep these organs of government from encroaching upon the prerogatives of one another. It was not realized by those who so readily accepted the theory of the separation of powers, however, that Montesquieu's teachings were based largely upon a misconception of existing English government. The Bourbon despotism of his own country seemed to Montesquieu to be the result of concentrating all powers in one centre, namely, in the monarch's hands; his ideal of what a free government ought to be was the government of England under the Hanoverians.

So far as France was concerned, Montesquieu was right; but as regards England, he was wrong. In France the boast im-

<sup>1</sup> *The Federalist*, No. 47.

<sup>2</sup> John Adams of Massachusetts, a loyal apostle of Montesquieu, was able to find no fewer than eight separate "checks and balances" in the constitution. See John Adams, *Works* (10 vols., Boston, 1850-1856), Vol. vi, p. 467.

puted to Louis XIV, "*L'état c'est moi*," expressed no mere fiction of royal power. The king was the state; he made the laws by royal decree, enforced them, and sent men to prison by his personal orders. All governmental power was centralized in him. In England the political situation during the second half of the eighteenth century was very different. There the king had no such unrestrained authority. Yet the principle of checks and balances was not really embodied, as Montesquieu thought, in the English government of his day; the legislature there dominated and controlled the executive, just as it still continues to do. Montesquieu was looking at the ancient theory of English government which gave the crown a position of executive independence; he was unmindful of the actual facts of English government which gave parliament, through a ministry responsible to it, the power to control the actions of the crown.

Despite the rancor which remained in their hearts as the natural result of the Revolution, the political leaders of 1787 admired the spirit and the institutions of English government. It is no wonder that they did. Britain alone of all great countries had at that time even a pretense of free government. Alone among the nations the United Kingdom loomed up as the shadow of a great rock in a weary world of despotisms. Yet even James Madison, with all his political erudition, did not really understand the true spirit of the government under which he was born. Neither he nor Washington, nor Hamilton, nor Wilson, nor Franklin, much less the minor lights of the constitutional convention, had any real appreciation of the great gap which had already been torn between the theory and the practice of English government. To-day this gap has become so obvious that no elementary student of the subject ever misses it. In legal fiction the crown remains the chief executive, an independent "estate of the realm," as the phrase goes, with all its time-hallowed prerogatives. In actual fact, however, the crown is the mere creature of parliament, doing as it is told and having "neither eyes to see nor tongue to speak" save as parliament may command. In 1787 the supremacy of parliament, although not so clearly marked as to-day, was established beyond any question. But the men who made the constitution of the United States failed to see it. They were misled by the husks of theory which obscured the kernels of fact.

The fathers of the constitution admired but did not fully understand the English system of government.

They overlooked the most distinguishing feature of English government — the cabinet.

So they gave little attention to what had already become, without the enactment of a single law, the most distinguishing feature of English government—the cabinet. When they thought of the executive branch of English government, they had their minds on the crown, not on the cabinet. They did not realize that even in their own day the prime minister was the master of the crown and the servant of parliament, and hence that all clean-cut separation of powers between executive and legislative organs of government had vanished. That is why we sometimes say that the system of checks and balances was woven into the American constitution by reason of a misconception. Its acceptance sanctified an error. But it was not a fatal error as the sequel has proved.

Complete separation of powers neither practicable nor desirable.

In the rigid form which Montesquieu gave it the theory of checks and balances is unworkable. The absolute independence of the three great departments of government would bring administration to a standstill. There must be points of contact. The framers of the constitution realized this and so made no attempt to secure complete separation of powers. They gave to the Senate, for example, the right to withhold its confirmation of appointments, thereby awarding it a share in the exercise of executive power. On the other hand, they gave the President, through his veto, the power to exercise a check on legislation. Madison deemed it worth while to argue, when the constitution was before the states for ratification, that Montesquieu had not urged a *complete* separation of powers. The French philosopher's dogma, as "illustrated by the example of his eye," he said, aimed merely to secure broad lines of separation and did not preclude slight overlappings of jurisdiction.

Is the theory of checks and balances sound?

The notion that there can be no liberty without a separation of governmental powers, without a system of checks and balances, is one that might easily be expected to find favor a century ago; to-day it is far from commanding general acceptance by students of political science. The federal governments of Canada and Australia, for example, with no separation of powers, have demonstrated Montesquieu's dread of centralization to have been in large measure imaginary. It is impossible to say, of course, whether the United States would have fared better or worse under a constitution framed by men who knew not Montesquieu; but there are many thoughtful Americans who



nowadays believe that the theory of checks and balances is a delusion and a snare, that it has made for confusion in the actual work of government, that it divides responsibility, encourages friction, and has balked constructive legislation on numberless occasions. None of the new constitutions adopted by European countries after the world war took any stock in it. Outside the Western Hemisphere it has long been regarded as an exploded idea. On the other hand, the doctrine still retains in America a host of staunch friends who insist that some system of restraint must be placed on all governmental authority. In England the main reliance for checking and balancing the supreme will of parliament is placed upon public opinion; but in the United States with such a great range of geographical interests and so polyglot a population, it may be that some more rigid check is needed than public opinion could ever be expected to supply.<sup>1</sup>

The third fundamental of the American constitution is the doctrine of judicial supremacy.<sup>2</sup> In every sovereign state there must be "a supreme authority whose determinations are final and not subject to any recognized power." In England this supremacy rests with parliament, which can do whatever it will so long as it keeps within the bounds of what is humanly possible. No executive can veto the acts of parliament, no British court declare them unconstitutional. In the French Republic, although there is a written constitution, no court can set aside the mandate of the Senate and the Chamber of Deputies when they act in accord. These two countries, Britain and France, have accepted the doctrine of legislative supremacy. But, in the United States, that is just what the framers of the constitution sought to avoid. Experience with repressive acts of the English parliament in the days before the Revolution had impressed upon them the belief that it is the habit of all legislatures to become tyrannical, and it was not their purpose, as one of them put it, "to create an elective despotism" on this side of the Atlantic.

3. The doctrine of judicial supremacy.

<sup>1</sup> The question raises the whole issue of presidential *versus* parliamentary government which is discussed in a later chapter.

<sup>2</sup> For a full discussion of this topic, see C. G. Haines, *The American Doctrine of Judicial Supremacy* (N. Y., 1914), E. S. Corwin, *The Doctrine of Judicial Review and the Constitution* (Princeton, 1914) and Charles A. Beard, *The Supreme Court and the Constitution* (N. Y., 1912).

Did the framers intend to make the Supreme Court the guardian of the constitution?

Yet final authority, as has been said, must in all governments be placed somewhere. It is impossible to conceive of a federal republic without a supreme authority. But this supremacy, in America, could not be given to Congress—the states would not have tolerated it. Nor could it be lodged with the state legislatures alone, for that would have enabled them at any time to make the federal government powerless. So it was placed in the constitution itself, which was declared to be the “supreme law of the land.” This was an entirely logical thing to do. It was in accord with the principle of checks and balances. But merely declaring the constitution (together with laws and treaties made under its authority) to be the supreme law of the land was not enough. Laws and constitutional provisions possess no momentum of their own. The framers of the constitution were well aware of this. Was it their intention, therefore, to have the Supreme Court serve as the guardian of the constitution, interpreting it, ensuring its supremacy, and declaring null any act of Congress that might overstep the allotted bounds of federal power? Did they have in mind the idea that the Supreme Court should be supreme to the extent of being authorized to declare acts of Congress invalid and unconstitutional?

A hard question to answer.

This is a hard question to answer. Among the pundits of political science there has been a great deal of wrangling about it. The constitution itself is silent; it contains not a word to express or imply that the Supreme Court is vested with power to pronounce the last word on questions of constitutionality. Nor do the debates in the constitutional convention throw much light on the point. The Randolph plan provided for a council of revision, made up of “the executive” (presumably the President and the Vice President), together with “a convenient number” of federal judges. This council was to scrutinize laws passed by Congress, and any measure to which it objected would be void unless re-enacted in Congress by a two-thirds vote. The convention did not like this proposal and chose the simpler method of giving a veto power to the President alone. In the course of the debate something was said about the inadvisability of giving judges any power to override the law. “The judges of Aragon,” remarked John Dickinson, “began by setting aside laws and ended by making them.” But the con-

vention never faced the definite issue of judicial supremacy, never discussed it, and never voted on it.

What the convention would have decided if the problem of "guarding the constitution" had come fairly before it we have no way of knowing.<sup>1</sup> We do know, however, that the leaders of the convention were aware of the action of state courts in declaring state laws unconstitutional—in the Rhode Island case of *Trevett v. Weeden*, for example.<sup>2</sup> Hence the idea that a court could set aside a law was by no means unfamiliar to them. And Alexander Hamilton, in urging the ratification of the constitution by the states, plainly affirmed that the constitution intended the judicial power to serve as an intermediary "between the people and the legislature" in order "to keep the latter within the limits assigned to their authority."<sup>3</sup> It is not unfair to assume, therefore, that if the convention had been strongly averse to the idea of judicial review, it would have gone on record against it.

One side-light on the matter.

The power of the Supreme Court to declare statutes unconstitutional is sometimes said to be unique. But such is not the case. The Judicial Committee of the Privy Council, which is a supreme court so far as India and the British dominions are concerned, has power to declare Indian and colonial statutes unconstitutional. The supreme courts of Argentina, Bolivia, Colombia, Mexico, Venezuela and Cuba have the authority also.

Not a unique power.

In government, at any rate, it is facts not intentions that count. And the fact is that the Supreme Court in due course assumed the power to declare laws unconstitutional, has exercised the power freely, and unequivocally possesses it today.<sup>4</sup> The doctrine of judicial supremacy is an obvious and funda-

The facts of the situation: They provide the answer.

<sup>1</sup> Professor Charles A. Beard, after a careful study of all the evidence, is convinced that a majority among the leaders of the convention believed the right and duty of passing upon the constitutionality of laws to be within the authority of the court.

<sup>2</sup> J. B. Thayer, *Cases in Constitutional Law* (Cambridge, 1904), Vol. I, pp. 73-78.

<sup>3</sup> *The Federalist*, No. 78. "The interpretation of the law," said Hamilton, "is the proper and peculiar function of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law."

<sup>4</sup> It first assumed in 1803 (*Marbury v. Madison*, 1 *Cranch*, 237) the power of declaring laws of Congress unconstitutional; then, in 1810, it assumed the power of voiding acts of the state legislatures by reason of their repugnance to the federal constitution (*Fletcher v. Peck*, 6 *Cranch*, 87). Down to the beginning of 1924 it had declared the unconstitutionality of about fifty federal laws.

mental fact of American constitutional government. It is indeed the most distinctive feature of it. Whether the framers of the constitution intended it to be so is now an academic question, hardly worth further controversy.

4. The theory of constitutional limitations.

One other feature distinguishes the constitution of the United States from those of some other countries, from the constitutions of Canada or of Australia, for example. Both of these latter are federations of Anglo-Saxon origin, and their respective constitutions have borrowed much from the United States, but in neither case have they accepted the American theory of "constitutional limitations." The constitutions of Canada and Australia merely establish organs of federal government and allot powers; the constitution of the United States not only does these things, but it also places express limitations upon both the national and state governments. It enumerates various things which no government may do, such as condemning men to death by legislative process or taking private property without just compensation. Hence no government in the United States, whether national or state, is absolutely sovereign. It is sovereign only within the limits of the constitution. The only absolutely sovereign authority in America is that authority which can change the federal constitution, namely, two-thirds of the members of both houses of Congress and a majority of the members in each of three-fourths of the state legislatures acting in accord, or, alternatively, a majority of the members of a national convention together with a majority of the members of ratifying conventions called in three-fourths of the states, all acting in accord. Whether all the limitations which appear in the Constitution of the United States have really served a useful purpose is a matter to be discussed in another chapter; they form, at any rate, a distinctive feature of the document.<sup>1</sup>

5. The conspicuous omissions.

Finally, the Constitution of the United States is distinctive for what it omits. Its silence on some points is eloquent. It is curiously minute on various minor points such as the calling of the Yeas and Nays in Congress. On the other hand it says

<sup>1</sup>The idea of inserting constitutional limitations upon the power of the legislative body appealed to the framers of the new German constitution in 1919. They incorporated in this constitution a considerable list of things that must not be done by the government. But in most cases they emasculated the prohibition by adding the proviso: "Exceptions may be made by law."



absolutely nothing about many things that have become great issues in contemporary politics. There is not a word, for example, about the acquisition and government of remote dependencies such as the Philippines, nothing about corporations, banks, immigration, education, budget-making, and the regulation of industry. The Constitution of the United States contains fewer references to economic matters than does the written constitution of any other country. Happily, however, the powers given to Congress were couched in such broad terms that they have enabled some of these questions to be dealt with by the national government; were it not for this the constitution would have been more frequently amended during the past fifty years and the amendments would have been of wider scope. But there is a limit to the expansiveness of the written word, and the flood of proposed amendments that has descended upon Congress in recent years would seem to indicate a reaching of this limit.

The silence of the constitution on so many great issues is due to two rather palpable reasons. In the first place its framers could not forecast the social and economic problems that would arise in the days of their great-grandchildren. And in the second place it is by no means certain that they would have given any thought to such problems, even if they had foreseen them. They were not seeking to stereotype the governments of the nation and the states for centuries to come. They were trying, above all things, to swing the country away from the drift toward anarchy, to make it safe for decent citizens to live in, able to pay its debts, and worthy of respect by the rest of the world. That was a big enough job for the moment. As for the future they provided no fewer than four different ways by which the constitution might be amended whenever an occasion for amendment should arise. They were at great pains to make certain that, whatever else might happen, neither Congress alone, nor the state legislatures alone, should ever be able to prevent amendments being made.

These are the outstanding features of the national constitution. No one of them was wholly new even in 1787. The idea of a written constitution as a grant of powers is as old as the Lycian Confederacy; the theory of separation of powers harks back to Polybius and Aristotle. The doctrine of judicial

Reasons  
for these  
omissions.

Constitu-  
tion  
contained  
few wholly  
new  
principles.

supremacy and the idea of constitutional limitations were both evolved out of English and American experience in the years before the constitution was drawn. When, after the constitution had been some time in operation, the Supreme Court announced its right to declare an act of Congress unconstitutional, it certainly did not impress the people as doing anything revolutionary. At common law any act done by any official beyond the limits of his legal jurisdiction was void. The doctrine of judicial supremacy was merely the same general notion greatly enlarged and somewhat modified. Even for its silence on many important matters the constitution of the United States found an abundance of precedents in the constitutions of the individual states.

And what has been said of fundamental doctrines is also true of the actual provisions of the constitution from preamble to conclusion. Writers have sought to make a distinction between the "original" and "derived" features of the constitution, but the former make a very meager list. Few of its provisions represent innovations. Many go back to the great landmarks of civil liberty like Magna Carta and the Grand Remonstrance. Nearly all run their roots far down into the subsoil of English history. What did not come from England came chiefly from the rich storehouse of colonial experience. Let it not be forgotten that Englishmen had been adapting their ancient political institutions to the conditions of the New World for over a hundred and fifty years—a longer period than that which has to-day elapsed since the American constitution went into force. They had tried many things, had succeeded in some and failed in others. They had a large fund of actual experience to draw upon, and what is more, they used it. To foreign lands, accordingly, the framers of the constitution went for very little.<sup>1</sup> The experiences of ancient confederacies, mediæval republics, and

<sup>1</sup> "With the exception of the method of electing the president there is not a clause of the constitution which cannot be traced back to English statutes of liberty, colonial charters, state constitutions, the articles of confederation, votes of congress, or the unwritten practice of some of these forms of government."—A. B. Hart, *National Ideas Historically Traced* (N. Y., 1907), p. 139. For a further discussion of this point the following books may be indicated: J. H. Robinson, *The Original and Derived Features of the Constitution* (Philadelphia, 1890); C. E. Stevens, *Sources of the Constitution of the United States* (2d ed., N. Y., 1894), and Sydney G. Fisher, *The Evolution of the Constitution of the United States* (N. Y., 1897).

eighteenth century absolutisms were instructive mainly in showing them what to avoid.

"In reading over the records of the federal convention," says Professor Channing, "one is amazed at the slight attention paid to the history of early confederations, except to shun the weaknesses which the annals of those leagues plainly set forth."<sup>1</sup> But there is no need for so good a political scientist as Professor Channing to be amazed at it. American statesmen have never, at any time, paid much heed to the political experience of other countries. In framing a scheme of government for the Philippines, for example, how much study did Congress (or anyone connected with it) give to the experiments in tropical colonization conducted during three centuries by other countries? No, it has never been the habit of American political leaders to go afield for their ideas on government. They regard all good ideas in this field as being native born, born free, and born equal.

The framers of the constitution took some comfort, however, from one other dictum of Montesquieu, that the best government is "that which best agrees with the humor and disposition of the people in whose favor it is established."<sup>2</sup> Their minds were set upon the task of framing a constitution which would fit the "humor and disposition" of the three million souls who lived along the Atlantic seaboard. Scholars have wasted much energy in trying to find out-of-the-way origins for some of the things which went into the constitution. For the electoral college which was established to choose the chief executive of the United States there is no need to seek precedents in the electors of the Holy Roman Empire. It was undoubtedly suggested by a somewhat analogous arrangement which already existed in Maryland. If the Fathers had felt that there was anything holy, or Roman, or imperial about this institution they would probably have relegated it to the waste-basket.

The constitution, in fine, contains very few marks of creative genius; there is practically no provision of any importance for which some well-known Anglo-Saxon precedent cannot readily be found. The most solid and excellent work done by the convention was its enumeration of the eighteen powers of Congress,<sup>3</sup>

It is not  
surprising  
that so  
little  
was  
borrowed.

<sup>1</sup> *History of the United States*, Vol. iii, p. 496.

<sup>2</sup> *The Spirit of Laws*, Book I, ch. 3.

<sup>3</sup> Article i, Section 8.

and its definition of the judicial power of the United States.<sup>1</sup> In both these cases the experience of the country during the critical years between 1781 and 1787 served the framers as virtually their sole guide.

<sup>1</sup>Article iii.



## CHAPTER V

### HOW THE CONSTITUTION HAS DEVELOPED

The American constitution has been worn away in one part, enlarged in another, modified in a third, by the ceaseless action of influences playing upon the people. It has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit.—*Lord Bryce.*

Professor Dicey, in his interesting discussion of parliamentary sovereignty, divides all constitutions into two general classes, flexible and rigid. The English constitution, he says, is flexible because its provisions may be changed in the same way as any ordinary law, by the regular law-making authority of the realm, which is parliament. The Constitution of the United States, on the other hand, he calls rigid, because it cannot be so altered by the regular law-making authorities, that is, by the President and Congress. Flexibility, he suggests, makes for constitutional progress and easy change; rigidity for conservatism. In illustration of this he asserts that the Constitution of the United States did not undergo a small part of the changes which marked the constitutional development of England during the nineteenth century.<sup>1</sup>

Flexible  
and rigid  
constitu-  
tions.

Now this difference between flexible and rigid constitutions, is easy to exaggerate, and Professor Dicey, in contrasting English with American constitutional development, has laid too much stress upon it. If the American constitution could only be expanded or developed by actually amending it, there would be good reason for calling it rigid, because the methods of amendment are rather clumsy and difficult. But there are other ways, quite as effective and much simpler. The Constitution of the United States has been enabled to keep pace with the economic and social needs of the country by various other agencies of development, and these processes of change

The  
distinction  
has been  
over-  
empha-  
sized.

<sup>1</sup> *Law of the Constitution*, p. 120.

move so insidiously that they have never been fully appreciated by foreign students of American government.

English and American definitions of "constitutional development."

Their haziness on this point is in part due to the use of the word "constitution" in two different senses. In a narrow sense the Constitution of the United States is a document of twenty pages dealing with the fundamentals of government. But in a broad sense it is this document plus the great number of statutes, decisions and usages which have been tacked to its edges since 1787, expanding it, elucidating it, modifying it, and bringing it abreast of the times. When we wish to compare the constitutions of different countries, therefore, we should first reduce them to a common denominator. It is absurd to contrast the *constitution* of England, meaning thereby the whole body of fundamental laws, court decisions, and usages which determine the way in which Englishmen are governed, with the *constitution* of the United States, meaning by that term only the written document and taking no cognizance of the whole body of interpreting laws, decisions, usages, and devices which supplement and determine the real application of those written provisions. There never has been, and never can be, such a thing as a *rigid* constitution. All constitutions are flexible; it is only that some are rather more flexible than others. And the degree of flexibility does not depend upon the ease or difficulty with which the constitution can be amended, for it is not by the process of formal amendment that a constitution acquires its suppleness.

The English constitution is not really more flexible than the American.

If we look at the matter in this light, meaning by the American constitution that whole body of organic jurisprudence which fundamentally determines the forms and facts of actual government, it is not true that the Constitution of the United States has shown itself to be far less flexible than the constitution of England. Let the following example illustrate this point. Among the great constitutional changes in England during the past hundred years not the least important are those embodied in the Reform Acts of 1832 and 1867 which greatly widened the suffrage. These reforms stirred public discussion to its depths. The whole world realized at both these dates that England was undergoing a great constitutional transition. But substantially the same widening of the suffrage, and indeed an even greater widening, took place in the United States during

the first half of the nineteenth century without any actual amendment of the constitution, but merely through the enactment of new suffrage laws by the various states. When the national constitution went into force, manhood suffrage existed almost nowhere. Yet within fifty years it had spread all over the country. No constitutional amendment was necessary to accomplish this, for the federal constitution, as framed in 1787, did not lay down any definite rule as to who should vote at national elections. It left the matter to be determined, under certain limitations, by the several states themselves. Then, one by one, all the states accepted the principle of manhood suffrage, and this, *ipso facto*, extended it to national elections. Property qualifications for voting have been everywhere abolished in the United States although not a word of change has been made in the constitution on this point.

Suffrage  
widening  
as an  
example.

Take another example, the power of the Supreme Court to declare laws unconstitutional. The constitution, as has already been pointed out, contains no reference to any such right. The court assumed it, whether with or without good reason is not the question here. But to say that it is not a feature of the American constitution because it does not stand written in the document is like saying that cabinet responsibility is not a feature of the English constitution because no word about it appears in any English statute. Some of the most notable mutations in the spirit and facts of American government have taken place without the necessity of altering a single word in the supreme law of the land. To regard a written constitution as rigid, merely because it cannot be easily amended is to overlook all the other great agencies of modification which are unceasingly at work.

Another  
example —  
Supreme  
Court's  
power.

Whether a written constitution may properly be called "rigid" depends upon the breadth of its various provisions and upon the policy of the authorities who interpret these provisions. It depends, above all, upon the political temper and traditions of the people. Hence it is entirely possible for a written constitution to be more flexible, and more easily brought into tune with new and popular demands, than one which has not been embodied in writing. In some countries the traditions of the people are more conservative, more averse to change, than they are in others. Strong conservatism gives rigidity to all constitutional

The true  
test of  
flexibility.

institutions and practices, no matter how easy the formal processes of change may be. Where, on the other hand, public opinion is progressive and forward-looking it will bend the constitution into conformity with its own spirit—yes, even if the words of the constitution be graven on tablets of stone.

The American constitution in its broader sense.

The Constitution of the United States, using the term in its broader and more accurate sense, is not a roll of parchment reverently treasured in the archives at Washington, printed in the appendix of every text-book, and committed to memory by half the schoolboys of the country. It is far more than that. "It is a vast, living, growing organism, in constant flux, defying all attempts of the philosophers to classify it as rigid or static."<sup>1</sup> It is made up of five elements, as follows: (a) the original document, (b) nineteen amendments, (c) a great array of statutes supplementing the general provisions of the original document and the amendments, (d) a long line of judicial decisions interpreting the document, the amendments, and the statutes, and (e) a host of usages, customs, traditions, and time-honored ways of doing things which have acquired all the strength of law or more. Let us look at these elements, one by one; but not in the order above given, for it will better serve the interests of clarity to speak of the statutes, decisions, and usages before dealing with the process of formal amendment.

How the original constitution has developed:  
1. Development by law.

The simplest form of development is development by law. The Constitution of the United States and its amendments are couched, for the most part, in general terms. They leave many things to be worked out by statutes, either in Congress or in the various state legislatures. Among those who framed the constitution there was no desire to have things exactly uniform throughout the country except insofar as uniformity seemed to be absolutely essential. They did not deem it their function to settle all the details of government. On the contrary, they were anxious to avoid what one of the delegates called a "too minutious" assumption of omniscience. Knowing that they could not provide for all contingencies, they did not try to do so, but trusted to future Congresses, or to the various state legislatures, to provide whatever detailed arrangements might prove necessary.

<sup>1</sup> F. A. Ogg, and P. Orman Ray, *Introduction to American Government* (New York, 1922), p. 209.



In this way great scope was left for the development of the constitution by merely changing the national or state laws. And in the last century and a quarter there has been a tremendous development through this channel. The whole structure of the subordinate federal courts is provided for by statutes, since the constitution merely handed over to Congress the duty of making such provisions in whatever way it deemed best. The succession to the presidency, in the event of the Vice President not being available, is similarly arranged by law. There is scarcely a word in the constitution relating either to the President's cabinet or to the organization of the various executive departments. In two places there is mention of "heads of departments" but not a word about how many departments there should be, or how they should be organized, or what functions should be performed by them. All such matters were left to be settled by law. The present method of governing territories and insular possessions again rests wholly upon law and not upon constitutional provision. So, likewise, the methods by which members of Congress are nominated, and even the determination of who shall vote at congressional elections, are left to be arranged by the laws of the several states. Concerning the actual, present-day workings of the federal government, therefore, one cannot get any adequate knowledge by merely studying the words of the constitution itself. By far the greater portion of what the student of government desires to know is not there. It is set forth in the statute-books of the nation and the states.

Even the process of lawmaking has had to be built up without much guidance from the written provisions of the constitution. The constitution declares, for example, that the House of Representatives shall choose its own Speaker, but it does not say what his powers shall be. These are fixed by the rules of the House. It requires the assent of both House and Senate for the enactment of laws, but says nothing about how a disagreement between the two chambers shall be settled. The whole system of conference committees is based upon rules made by the two legislative bodies themselves. The constitution does not even require that bills be given three readings, or referred to committees, or placed on the calendar. It leaves the whole process of lawmaking to be worked out by the legislative bodies.

In the second place, the constitution has been developed by

Some  
examples.

2. Development by judicial interpretation.

judicial and administrative decisions. This may sound strange to those who have been brought up on the doctrine that courts only "enforce," and never "make," our constitutions and laws. *Jus dicere, non dare*, the saying is. It is an orthodox theory that the courts merely interpret and apply. Yet every lawyer knows that to interpret a phrase often means to give it a new application, and the Supreme Court of the United States has read into the American constitution many things which are not there visible to the naked eye. Mr. Justice Holmes blurted out the truth when he said that judges "do and must legislate"—Aristotle, Montesquieu, Blackstone, and all other theorists to the contrary notwithstanding.

Some examples.

For one hundred and thirty-seven years question after question has been coming before the Supreme Court as to the meaning and scope of various provisions, phrases, and words in the organic law of the nation. "Congress," the constitution declares, "shall have power . . . to regulate commerce. . . ." But what is included within the term "commerce"? In matters of trade and industry the United States has been moving forward with phenomenal rapidity, each year bringing new problems concerning the relation of government to business. It has been the work of the Supreme Court, through its power of judicial interpretation, to "twist and torture" (as Lord Bryce puts it) the term "commerce" so that it will cover them all. What, again, does the constitution mean by the words "to regulate"? By its regulating power may it tax, may it even prohibit? The Supreme Court has answered that it may do either or both. It has held at various times that the commerce power of Congress extends not only to the transportation of freight and passengers, but to the transmission of telegrams, telephone messages, light and power, the sending of oil through pipe lines, to pilotage, maritime contracts, and many other things.<sup>1</sup>

How do these words and clauses get before the Supreme Court for interpretation? There is only one way in which they can come. Congress passes a law, or a state legislature passes a law, or a public official claims a right which somebody believes to be contrary to a provision in the constitution. So this somebody merely refuses to obey the law. He is thereupon hailed into court and offers in his defence the plea of unconstitution-

<sup>1</sup> See below, pp. 308-309.

ality. Ultimately the issue is carried by appeal to the Supreme Court which settles the question. It declares that the law is or is not repugnant to some provision in the constitution. And in giving reasons for its decisions the court elucidates, step by step, what the meaning of each provision is. The Supreme Court never makes an interpretation of any word, or phrase, or provision until a case actually comes before it. But so many controversies have actually been brought to it year after year that there is hardly a clause in the constitution which has not been scrutinized, analyzed, dissected, construed, and re-construed.

Here we have, therefore, a new element of flexibility. The student who wants to know what the actual powers of Congress are to-day will get a scant idea of their scope and ramifications by merely surveying the eighteen formal powers granted in the words of the constitution itself. Hundreds of Supreme Court decisions have widened these original powers beyond recognition, yet never in a single instance has the court asserted its power to make any actual change in the phraseology. The stretching of a phrase in one decision gives a foundation for some further elongation in the next; the lines of development are pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began. Let one or two illustrations suffice: In 1824 the Supreme Court ruled that "commerce" included the carriers of commerce; then by a series of decisions extending over a hundred years it has held that the term also includes the transportation of passengers by land and water, the sending of messages by wire, and the transmission of electric power; but that "commerce" does not include manufacturing, or life insurance, or the making of commercial contracts. Hence it is that a word which was put into the constitution by men who knew only sailing vessels and stage coaches has been broadened to include steamships, railroads, telegraph and telephone lines, and even traffic by airplanes.

Again, take the word "excises" as used in the constitution. What is an "excise"? The court has held that a tax on carriages is an excise, likewise a tax on inheritances, and a tax on the net earnings of corporations. It held that a tax on oleomargarine is an excise within the power of Congress to levy, but that a

The steady expansion of words and phrases in the constitution.

tax on the products of child labor is not. The framers of the constitution realized, of course, that differences of opinion would arise as to what various words expressed or implied, and perhaps they assumed that the courts would resolve those differences just as they had been doing under the state constitutions. But they could not have foreseen the stupendous amount of interpreting that would have to be done, or the subtle way in which this process would in the end spell actual change. This power to interpret the constitution is a far-reaching power, with great possibilities for good and ill. Its exercise has greatly modified and expanded the provisions of the constitution; and it is probably true that a greater development has taken place through this than through any other channel. The study of American constitutional law to-day is chiefly concerned with the study of judicial decisions.<sup>1</sup>

Its effect  
in  
strengthening the  
national  
government.

How has this method of development affected the relative powers of the nation and the states as originally adjusted by the constitution? On the whole the course of judicial interpretation has greatly widened the actual powers of the national government, carrying them far beyond what the framers of the constitution could ever have foreseen or intended. The Supreme Court at an early date accepted the doctrine of "implied powers"; in other words the idea that whenever the constitution gives to Congress a general power in express terms, it conveys by implication all the collateral authority that may be necessary or proper for carrying such general power into effective operation. The constitution, for instance, gives Congress no express power to charter banks, but it does give a general power to borrow money. Hence the Supreme Court long ago decided that if Congress regards the establishment of banking institutions as a necessary or proper aid to the exercise of its borrowing power, it may establish banks.<sup>2</sup> With the general power to tax, to borrow, to regulate commerce, to establish post-offices and post-roads, one action after another on the part of

<sup>1</sup>The most important of these decisions have been brought together in various compilations, of which the best is James Bradley Thayer's *Cases in Constitutional Law* (2 vols., Cambridge, 1895). A smaller collection, Lawrence B. Evans, *Cases on American Constitutional Law* (Chicago, 1916), will be found more convenient for student use. Emlin McClain, *Selection of Cases on Constitutional Law* (2d ed., Boston, 1900), is also well worth notice.

<sup>2</sup>See below, p. 293.



Congress has been upheld. The distance between the action of Congress and the literal words of the constitution often seems very great, but a chain of decisions bridges the gap between. Every general power of Congress has been as a sun, developing its group of planets or subsidiary powers, while around these in turn have grown up a girdle of satellites.

But it is not the courts alone that interpret the constitution. Administrative officers, from the President down, are often confronted with the necessity of acting when their constitutional powers are not clear. Their actions may be challenged and subjected to judicial review, but very often they are accepted without any such protest. In that event the action forms a precedent for the future. It does not form a binding precedent, of course, for no administrative ruling, however long acquiesced in, is certain to be upheld by the courts. Nevertheless, when any administrative interpretation of a constitutional clause has been allowed to pass for a long time unchallenged, and particularly when important public or private rights have been based upon it, the interpretation is likely to be accepted. In recent years there have been many administrative rulings which virtually operate as agencies of constitutional development. The opinions of the Attorney-General, given for the guidance of the executive departments, afford a good illustration.

The construing of constitutional provisions by administrative rulings.

In the third place the constitution has been developed, expanded, and modified by usage or custom. What habit is to the individual, usage is to the body politic. Nations, like men, get into the habit of doing things in a given way; the habit becomes hardened until it becomes a national usage, very difficult to change. So, alongside the written constitution there has grown up in America a body of usages based neither on laws nor judicial decisions, but merely the result of long-continued habit, and these form what we may properly call the "unwritten constitution" of the United States.<sup>1</sup> England is often cited as the classic example of a land ruled by political customs or usages, but America is a close second. Political usages have grown luxuriantly in the soil of the New World. And the men of 1787 expected that this would be the case. "Time and habit," said Washington, "are necessary to fix the true character of

3. Development by usage.

<sup>1</sup> C. G. Tiedeman, *The Unwritten Constitution of the United States* (N. Y., 1890).

governments." He was right. Time and habit have been hard at work on the constitution ever since the day it went into effect.

Some ex-  
amples :  
(a) the  
actual  
method of  
electing  
the  
President.

What are some of the usages that have modified, developed, and fixed the political institutions of the United States? The most striking of them all is one that concerns the method of electing the President. It was assumed by the constitution that the presidential electors would meet in the several states and would survey the whole field of possibilities before casting their votes. But by usage, as everyone knows, they have lost all freedom of choice whatsoever. They have become mere automata with a purely mechanical function. Thus they form to-day a wholly superfluous cog in the machinery of election. Yet there is nothing but usage to prevent their doing just what the constitution contemplated that they would do. The usage has become stronger than the constitution itself. Today the President of the United States is almost as directly chosen by the voters as though there were no intervening electors at all. In other words, there has developed precisely what the architects of the constitution sought to avoid. They did not desire the direct, popular election of the nation's chief executive, and they spent much thought in devising a scheme for preventing it.

(b) the  
confirma-  
tion of  
presiden-  
tial ap-  
pointments.

Again, the constitution empowers the President to make appointments subject to "the advice and consent of the Senate." But by usage the Senate's "advice" is never asked and by usage also its "consent" is in some cases rarely refused. The Senate seldom declines its consent, for example, to those whom the President selects for cabinet officers. The whole cabinet system, indeed, represents the outcome of "time and habit." In the written constitution there is no mention of a cabinet, not even a hint that there was to be such a body. It was expected, of course, that there would be executive departments (like the treasury department, the war department, and the department of justice), and ten such departments have been established by law; but usage alone has determined that the heads of these departments shall meet once a week and advise the President as his cabinet. When President Wilson went to France in 1919 he asked Vice President Marshall to preside at cabinet meetings during his absence. At once his critics flew to the constitution in quest of his authority to do this. Of course

(c) the  
cabinet  
system.

they found nothing. And when President Harding, in 1921, invited Vice President Coolidge to attend all meetings of the cabinet there was a similar querying of his right by the politically unsophisticated. But the simple fact is this: the President can call to his cabinet, at any time, and in any capacity, anybody he pleases. He could take the entire population of the United States into his cabinet without exceeding his plenary powers. The President's cabinet is whatever the President chooses to make it. Usage alone restricts him to summoning the heads of the executive departments.

Mention may also be made of the principle known for so many years as "senatorial courtesy," by virtue of which presidential appointments were not confirmed by the Senate unless first approved by the senators from the state directly concerned. This somewhat pernicious practice had no warrant in either the constitution or the laws; it merely grew up and became strong enough, at one period to rank as a noteworthy feature of actual government. In the matter of removals too, the existing practice is the result of usage and not of constitutional provision. As to how removals should be made, other than by impeachment, the constitution is silent, and the question early arose as to whether the advice and consent of the Senate applied to removals as well as to appointments. The President, however, assumed the responsibility of removing officials without seeking the Senate's concurrence, and usage, supported by judicial decisions, has established his right in the matter. It is a usage of American government, again, that no one shall serve more than two terms in the White House, but whether this usage has become so strong as to be unbreakable, the future alone can determine. At any rate it is far from what the framers of the constitution intended.

But the most important development which has come about in the field of American government as the result of usage is embodied in that complicated fabric which we call the party system. The leading statesmen of 1787 looked upon the rivalry of political parties—the violence of faction, they termed it—as a thoroughly vicious feature, an enemy to the best interests of free government. It was their hope and expectation that there would be no political "factions" in America, hence the constitution contains no mention of caucuses, primaries, conventions,

(d) appointments and removals.

(e) the machinery and work of political parties.

party platforms, campaign funds, and the other paraphernalia of modern party politics. Its provisions, indeed, were framed on the assumption that there would be no party organizations. It ignored the whole subject. Yet political parties sprang into being almost at the outset and gradually became dominating factors in the work of the new federal government. The whole party system as we now know it,—its organization, personnel, and methods, its manipulations both in Congress and outside—all this has been developed in the realm of unwritten law.<sup>1</sup> Only in recent years have the laws of Congress attempted to regulate party organizations and even yet these regulations go but a little way. Usage has created and maintains the party system. Yet who will say that party organizations do not profoundly affect the political life of the American people?

(f) other  
examples.

Various other examples of institutions and practices which owe their existence to usage and not to enactment might easily be given. Why are American ambassadors replaced when a new administration comes in? Why are many appointments in the federal service treated as "political patronage?" Why are the heads of the war and navy departments chosen from civilian life whereas the department of labor is always headed by a "labor man"? Why is the head of the nation addressed simply as "Mr. President" while the governor of Massachusetts is styled "His Excellency" and the mayor of Boston is "His Honor"? Even usages, however, may change. For a full century no President ever read his messages to Congress. The custom was to send them in writing by messenger. But President Wilson changed this custom, setting aside the precedents of a hundred years, and the new practice was continued by his immediate successor. From Washington to Taft, moreover, no President during his term of office ever left the jurisdiction of the United States. But President Wilson shattered this long-standing continuity of practice also. First and last he departed more frequently from usage than any of his predecessors. One must not conclude, however, that usage is a frail reed, easily broken. Now and then individual usages are snapped, but most of them display great resiliency.

<sup>1</sup> Parties had come into existence and were flourishing in 1804 when the twelfth amendment was adopted. But the framers of that amendment made no express reference to them.



Finally, the constitution has been developed by amending it. Its framers foresaw that the need for amendments would arise, but it was not their opinion that the need would be frequent nor was it their desire that the process of amendment should be easy. Hence they provided a rather cumbrous amending process which ordinarily (but not necessarily) involves action not only by Congress but by three-fourths of the state legislatures.<sup>1</sup> There are alternative methods of amending the constitution of the United States and they cannot be more clearly or concisely described than by using the exact phraseology of the document itself:

4. Development of the constitution by amendment.

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as parts of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."<sup>2</sup>

Now, while this is a model of conciseness and clarity, as legal phraseology goes, it leaves some important questions unanswered. Does the action of Congress, in proposing a constitutional amendment, require the assent of the President? The Supreme Court has held that it does not. When a state legislature has ratified a proposed constitutional amendment, may it later (before the necessary three-fourths has been obtained) rescind its action? Congress, by a joint resolution, has declared that this cannot be done. On the other hand a state legislature may first refuse to ratify, and then, at a later date, change its mind. So the rule does not work both ways. When a state legislature votes to ratify an amendment its action is not subject to veto by the governor. Then there is the question whether Congress, in proposing an amendment, may fix a limit of time within which the ratification must be completed. This Congress

Some questions relating to the process of amendment.

<sup>1</sup> Some members of the convention desired that the consent of *all the states* be made requisite for amending the constitution. But experience under the Articles of Confederation had made the delegates averse to unanimity. Some members thought that ratification by two-thirds of the states would be enough. The convention finally compromised on three-fourths.

<sup>2</sup> Article v.

did, for example, when it submitted the eighteenth amendment—fixing seven years as the maximum time. The Supreme Court held that this was allowable.<sup>1</sup> Finally, may a state legislature, when a proposed amendment comes before it for ratification, submit the question to the people by referendum? Certainly there is nothing to prevent the submission of the question to the people, provided the legislature itself takes formal action after the people have expressed themselves; but whether a state legislature may submit the issue to the people for final action is not yet settled.

When Congress initiates a proposed amendment, the secretary of state sends a certified copy of it to the governor of each state and he, in turn, transmits it to the legislature. When the legislature ratifies the amendment he so certifies to the secretary of state and the latter, on receiving certificates from three-fourths of the governors, proclaims the amendment to be in force.

There are two points upon which the constitution is not open to amendment without a breach of faith.<sup>2</sup> No state, without its own consent, can be deprived of its equal representation in the Senate. And no state can be divided, nor can any two states be combined, without the consent of the legislatures concerned.<sup>3</sup>

The first  
ten amend-  
ments.

Only nineteen amendments have been made to the national constitution in one hundred and thirty-seven years. The number is really much smaller, for the first ten amendments, all made at the same time, might well have been combined into a single one. As a bill of rights they should have been put in the original document, and the campaign for the ratification of the constitution would have been less arduous had this been done. Much of the opposition to the acceptance of the constitution was based upon its failure to provide any of the safeguards for individual liberty which had been incorporated into the constitutions of the various states. Some of the leaders argued that this was a people's government and that there was no need of a bill of rights to protect the people against the people—but that argument did not satisfy. Madison and others pledged themselves to work for a bill of rights if the constitution were rati-

<sup>1</sup> *Dillon v. Gloss*, 256 U. S. 368.

<sup>2</sup> There was a third restriction but it expired in 1808.

<sup>3</sup> This is inserted in the constitution as a limitation upon the powers of Congress; but it operates as a limitation upon the power to amend the constitution.

fied and these pledges helped to allay some of the opposition. Several state conventions, in ratifying the constitution, sent along a series of proposed "guarantees" to be added as soon as the constitution got under way. Immediately after the constitution had gone into force, therefore, Congress proposed twelve amendments, of which the states ratified ten. These ten amendments are really an integral part of the original document, and it is somewhat misleading to speak of them as amendments at all.

The remaining nine amendments fall into three groups. The eleventh and twelfth, were designed to remedy ambiguities and defects in the original constitution,—perfecting amendments, they might be called. The eleventh was a direct result of a Supreme Court decision which held that a citizen could sue a state in the federal courts. This interpretation of the judicial power aroused the champions of state rights, who bestirred themselves to have the sovereignty of the states made clear, and they succeeded. The other amendment, the twelfth, was proposed and adopted because the presidential election of 1800 demonstrated the need of changing that section of the original constitution which dealt with the choice of a President and Vice President. It is indeed, a tribute to the work of the Fathers that only two amendments have been directly due to flaws which they ought to have seen and remedied.

Later  
amend-  
ments:

(a) the  
eleventh  
and  
twelfth

For sixty-one years no further amendments were adopted, although many were proposed. Then came the Civil War, and after its close the post-bellum amendments, thirteenth, fourteenth, and fifteenth, embodying the principles for which the victorious northern states had been contending. These three amendments embody, as it were, the terms of peace. These amendments were submitted to the legislatures of the states which had seceded and acceptance was made an essential of readmission to the Union. Ratification was virtually imposed upon these states by the triumphant North. As Lord Bryce once said, these amendments marked a crisis and clinched a victory.

(b) the  
Civil War  
amend-  
ments.

Again there was a long interval during which no further amendments were made. Time and again proposals were made in Congress but they failed to obtain the necessary two-thirds majority. Meanwhile public sentiment was developing steadily along various lines—in favor of a reform in the federal tax

(c) the  
last four.

system, and in favor of the direct election of United States senators, for example. It was commonly asserted that despite this strong popular sentiment the constitution was virtually impossible to amend, that three-fourths of the states would never agree on anything. But the prophets were once more confounded. Within the short space of seven years, 1913-1920, the ratifications of four amendments were proclaimed. Of these the sixteenth permits Congress to levy and collect taxes on incomes without apportioning these taxes among the states; the seventeenth provides for the direct election of senators; the eighteenth abolishes the liquor traffic; and the nineteenth establishes woman suffrage.

Amend-  
ment as a  
last  
resort.

After all, the constitution has not been greatly changed by actual amendment. This is partly because the process of amendment, with forty-eight states now concerned, is much more difficult than its framers expected or intended, but it is also because there are easier ways of gaining the same end. By means of their senatorial primaries, for example, many of the states, long before the adoption of the seventeenth amendment, had virtually adopted the system of choosing senators by popular vote.<sup>1</sup> The election of the President by what is essentially direct popular suffrage has been secured by the coöperation of the state legislatures. If the various state legislatures, however, had persisted in naming the presidential electors themselves and had not turned this function over to the people, there is little question that a constitutional amendment would long ago have accomplished the change. Amending the constitution, far from being a first recourse, is our last resort method of obtaining what cannot be had by statute, by usage, or by judicial interpretation.

There have always been radicals, however, who would fain have tacked on amendments by the score. If half the amendments proposed during the past hundred and thirty-seven years had obtained the assent of Congress and had been ratified by the states there would now be nothing left of the original document. For these proposals have mounted far into the thousands.<sup>2</sup> There are about seventy of them in the files of Congress at the present

<sup>1</sup> *Below*, p. 190.

<sup>2</sup> See H. V. Ames, "Proposed Amendments to the Constitution of the United States," in American Historical Association's *Annual Report* (1896).



time. The framers of the constitution did well to protect their handiwork.

Is the constitution too hard to amend? Many people think that it is. The proposal has been made to simplify the amending process so as to require a bare majority in Congress and ratification by only a majority of the voters in a majority of the states, provided these form a majority of the voters in the whole country. But there is not much probability that any such change will be made in the near future. When public sentiment is strongly mobilized behind a proposed amendment there is surprisingly little difficulty in getting it ratified by the existing procedure. The eighteenth amendment, for example, slid through with bewildering speed. Forty-five of the forty-eight states ratified it in less than half the time that Congress allotted for ratification.

Should the amending process be made easier?

Too much controversy should not be centered, at any rate, on the process of amendment, be it hard or easy. For amendment is only one of the instruments of growth, and not the most important one. Great changes may take place in the spirit of a government without much alteration in the phraseology of its organic law. That is what has happened in the United States. The federal government has become far stronger than a literal reading of the constitution would indicate. It has steadily gained power, chiefly through channels of judicial interpretation, and the end is not yet. All this, moreover, is in spite of the provision that powers not given to the federal government revert to the states.

Results of constitutional development: (a) increased strength of national government.

As for the distribution of powers between the three organs of government,—executive, legislative, and judicial,—the balance as originally adjusted in 1787 has remained without rude disturbance. The executive, in relation to Congress, has grown stronger during the last half-century, and its authority in war-time is assuredly impressive, but Congress is still what the makers of the constitution designed it to be. The judiciary is the organ that has developed the largest measure of unexpected strength. It is well, however, that this has been the case; for, to be successful, a federalism must have a tribunal strong enough to act as an impartial arbiter between contending states, to protect the rights of minorities, and to safeguard the liberty of the individual.

(b) division of powers not disturbed.

(c) govern-  
ment has  
become  
more  
democratic.

It is not in the general organization but in the practical workings of American government, in the things which the laws and usages determine, that most of the development has taken place. The people of the United States live under a far more democratic government to-day than in the closing years of the eighteenth century. This is not because they have had a revolution, bloodless or otherwise. It is merely because a steady popularization in the spirit, usages, and methods of government has been entirely possible within the original framework. If the national constitution, as some now profess to believe, is a mere travesty upon the principles of popular government, enshrining the ideas of eighteenth-century reactionaries who had no confidence in democracy, it has at any rate afforded scope for the development of democratic institutions on a scale such as the constitutions and laws of no other country have ever permitted. The constitution of the United States, whatever one may think of its underlying philosophy, has served the cause of human freedom and world democracy as no other document has ever done.

And, after all, the *form* of a government reaches but a little way. It is the *spirit* that counts. "Constitute government how you please," Edmund Burke once wrote, "the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of ministers of state. . . . Without them your commonwealth is no better than a scheme on paper, and not a living, active, effective organization." So the government of the United States ought to be studied, not merely as a thing of laws but of men, not merely as a project but as a going concern.<sup>1</sup>

<sup>1</sup> Strange to say, there is no good book devoted to a survey of how the constitution has grown, step by step, during the past one hundred and thirty-odd years. But a volume on this topic, by Professor A. C. McLaughlin, is announced for forthcoming publication.

## CHAPTER VI

### THE CITIZEN AND HIS RIGHTS

Every man in a free country is, as it were, put upon his honor to be the kind of man such a polity assumes its citizens to be.—*Woodrow Wilson.*

The framers of the constitution, notwithstanding their aversion to the extremes of democracy, had a good deal of faith in the principle of government "by the consent of the governed." They regarded man as competent to determine his own political destinies. Accordingly they accepted the people as the source of all political power. They made the people sovereign. What they limited was not the sovereignty of the people, but the way in which this sovereignty might be exercised. There is nothing in the mechanism of American government which the people cannot change, provided they go the right way about it. It is fitting, therefore, that we should have some discussion of the sovereign citizen, his status, his rights, and his duties.

The sovereign citizens.

The constitution of the United States, in its original form, repeatedly uses the word "citizen," but does not define the term. It was taken for granted, no doubt, that the rule of English law, as laid down in Calvin's Case, would be followed, namely, that allegiance would be the test of citizenship, that all persons owing allegiance to the United States or to a state of the Union would be accounted citizens. The wording of the constitution seems to recognize this double citizenship, state and national, for it speaks of "citizens of different states" and also of "citizens of the United States." But no hint is given as to what difference, if any, was assumed to exist between the two. The matter was left as a hostage to the future.

Who are citizens?

Prior to the adoption of the fourteenth amendment in 1868 there was a great deal of controversy as to whether anyone could be a citizen of a state without being a citizen of the United States and vice versa. Those who upheld the doctrine of states' rights contended that citizenship of the United States was merely

The old controversy over dual citizenship.

the consequence of citizenship in some state of the Union, and that not every citizen of a state became ipso facto a citizen of the United States. In the *Dred Scott* case (1856), the Supreme Court took the same attitude.

The *Dred Scott* decision.

"It does not by any means follow," declared the court in this decision, that "because he [a negro] has all the rights and privileges of a citizen of a state, he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a state and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states."<sup>1</sup>

Reversed by the fourteenth amendment.

This left the situation in a hopeless muddle. South Carolina, for example, might confer citizenship upon an alien but without making him a citizen of the United States and hence leaving him without the status of a citizen in international law. Not being a citizen of the United States he would not be entitled to its protection abroad. Thus the issue remained, however, until 1866 when Congress passed an act providing that all persons born in the United States and not subject to any foreign power were to be deemed citizens.<sup>2</sup> This was followed, two years later, by the adoption of the fourteenth amendment which decreed that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside." This amendment rebuffed the doctrine enunciated in the *Dred Scott* decision. Citizenship of the United States was made fundamental. Since 1868, therefore, any citizen of the United States by birth or naturalization becomes a citizen of a state by merely taking up his residence there. And when he becomes a resident his

<sup>1</sup> *Dred Scott v. Sandford*, 19 Howard, 393.

<sup>2</sup> The Civil Rights Act.



privileges and immunities as a citizen of the United States must not be abridged thereby.<sup>1</sup>

So far as the rules of international law are concerned, only one citizenship is recognized, namely, citizenship of the United States. In relations with foreign powers all citizens of the United States, wherever resident, are alike; they are equally entitled to the protection of the national government; they carry the same sort of passport; they have the same privileges and immunities abroad. But constitutional law, the supreme law of the United States, still recognizes the dual nature of American citizenship, the fourteenth amendment being explicit on that point when it uses the words "citizens of the United States and of the states wherein they reside." A state may still give an alien all the privileges of state citizenship without making him a citizen of the United States. It may give him the right to vote, to serve on a jury, to hold office, to own property, and all the rest. But for all practical purposes the distinction between the two forms of citizenship has ceased to exist. The determination of a person's state citizenship (or residence, as it may better be called) is still important, however, in determining many things—where he pays his income tax, where his will is probated, and whether he may bring certain suits in the federal courts, for example. It is quite possible, of course, for a person to be a citizen of the United States without being a citizen of any state in the Union. There are thousands of such instances in the District of Columbia, likewise among American citizens who are permanent residents abroad.

The duality, however, still exists, although it is of no general importance.

The words of the fourteenth amendment might seem to be clear beyond controversy; but they are not. Note that the words "and subject to the jurisdiction thereof," introduce a qualification. They imply that birth in the United States is not conclusive in establishing American citizenship; one must be born within the jurisdiction as well as within the boundaries. The Supreme Court has held for example, that North American Indians born within tribal jurisdiction are not citizens by birth, and can only become citizens by naturalization. Children born to foreign ambassadors stationed in the United States are not American citizens by birth because foreign embassies are deemed

Citizenship by birth.

<sup>1</sup> Arnold J. Lien, *Privileges and Immunities of Citizens of the United States* (N. Y., 1913).

to be outside the jurisdiction. On the other hand the children born to an American ambassador or minister abroad are deemed to have been born within the jurisdiction.

A legal  
complica-  
tion.

Nor are these all the complications involved in the determination of American citizenship by birth. The fourteenth amendment declares that all persons born in the United States and subject to the jurisdiction thereof shall be citizens, but it does not say that no other persons shall be citizens by birth. It is quite possible, therefore, for a person to be born outside the boundaries of the United States, outside its jurisdiction also, and yet be an American citizen by birth provided their parents are American citizens. This is because the basis of citizenship by birth rests in the United States upon a commingling of two legal doctrines, known to lawyers as the *jus soli* and the *jus sanguinis*. The *jus soli*, which is the common law principle, regards place of birth as the controlling factor, while the *jus sanguinis*, which is derived from the law of Rome, puts the stress on parentage. France, Italy, and other European countries in which the legal system is based on Roman law, still hold parentage to be the deciding factor—any child wherever born, if born of French parents, is a French citizen. England, on the contrary, holds to the *jus soli* and stresses the place of birth, not the parentage. And the United States displays a generosity almost unique among the nations by recognizing both parentage and place as alternative qualifications.

Who, then, are American citizens by birth? The answer is twofold: First, all persons, of whatever parentage, born on American soil and subject to the jurisdiction of the United States. American soil, for this purpose, includes American embassies, American ships of war anywhere (even in foreign ports) and American merchant vessels on the high seas. It includes Alaska and Hawaii, and Porto Rico, but does not include the Philippines. Second, all persons of American parentage born elsewhere than on American soil are citizens of the United States. It ought to be mentioned, however, that such persons, if they remain in the countries of their birth, must register with an American consulate, at the age of eighteen, their intention to remain American citizens. And it should also be added that unless they take up and retain residence in American territory the United States will not protect such persons from obligations

(in the way of military service, etc.) which the country of their birth may claim from them.

Citizenship may be acquired not only by birth but by naturalization. The constitution confers on Congress the right "to establish an uniform rule of naturalization," thereby giving it complete power over the conditions and procedure by which aliens may become naturalized. No state can "naturalize" an alien, although it may confer on aliens the privileges of state citizenship.<sup>1</sup>

Citizenship  
by natural-  
ization.

Naturalization may be either collective or individual. In the former case whole bodies of persons may be admitted to citizenship at one stroke, as when new territory is annexed to the United States and the inhabitants of such territory taken within the fold of American citizenship by treaty or by act of Congress. This was done in the case of Texas. When Texas joined the United States in 1845 after a successful revolt from Mexico, all citizens of Texas were made citizens of the United States by resolution of Congress. So the act of Congress which provided a civil government for Hawaii (April 20, 1900) conferred American citizenship on all those who had been citizens of the Hawaiian Republic. On several occasions, when the United States has acquired new territory by treaty, the inhabitants of these territories have been made American citizens *en bloc* by the terms of the treaty.<sup>2</sup>

1. Natural-  
ization by  
statute or  
by treaty.

But the mere acquisition of new territory by the United States does not admit the inhabitants to American citizenship. There must be a specific provision either in the treaty or in an act or joint resolution of Congress. The treaty with Spain in 1898 by which the United States acquired Porto Rico and the Philippines contained no such provision: on the contrary it stipulated that the annexation of these islands should not admit their

Mere con-  
quest does  
not entail  
collective  
natural-  
ization.

<sup>1</sup> The Supreme Court ruled, in one of its earliest decisions (*Callet v. Collier*, 2 Dallas, 294) that the several states might also naturalize aliens; but twenty-five years later it reversed this decision and held that naturalization was exclusively a function of the national government (*Chirac v. Chirac*, 2 Wheaton, 259). Two monographs which deal fully with this general subject are F. Van Dyne, *Citizenship of the United States* (Rochester, 1904), and J. S. Wise, *A Treatise on American Citizenship* (N. Y., 1906). An informing "Report on Citizenship of the United States" was issued as an official publication in 1907 (59th Congress, 2nd Session, House Document, No. 326).

<sup>2</sup> For example the Louisiana treaty of 1803; the Florida treaty of 1819; the Alaska treaty of 1867, and others.

inhabitants to American citizenship. In 1917, however, Congress granted to the Porto Ricans full status as citizens of the United States and to the Filipinos it has given some of the privileges and immunities of citizens; but the Filipinos are not American citizens in the full sense of that term. They are citizens of the Philippine Islands and "nationals" of the United States, which means that they are entitled to the protection of the American government, to have American passports when they go abroad, and in general to enjoy all the rights of American citizens when outside American territory.

Collective naturalization by treaty or by action of Congress is not common. When one speaks of naturalization, it is ordinarily of the other form, namely, the naturalization of individuals. This is a judicial process the nature of which is prescribed, even to its smallest details, by the federal laws and particularly by the Naturalization Act of 1906. But although the work is performed by the courts the procedure is under the general supervision of a bureau of naturalization, which is within the federal department of labor. This bureau maintains representatives at various centers throughout the country. It is their business to assist applicants for naturalization.

There are three steps in the naturalization procedure, both of which must be taken before a duly authorized federal or state court. The first step is a formal "declaration of intention" to become a citizen. This formal declaration may be made by any alien who, being able to speak the English language, is "a white person, or of African nativity or of African descent,"<sup>1</sup> before any federal court or any state court of record having jurisdiction at law or in equity over the place in which he lives.<sup>2</sup> Such declaration may not be filed, however, until the alien has reached the age of eighteen years. The declaration must contain information as to the applicant's name, age, parentage, occupation, country of origin, and time and place of arrival in the United States; and it must further announce his intention to become a citizen. In filing this declaration the alien forswears

<sup>1</sup> It will be noted that this wording excludes both Chinese and Japanese. But children of Chinese and Japanese parents, if born in the United States, are American citizens by birth.

<sup>2</sup> Provided, however, that it is a court of record whose jurisdiction is not limited to controversies involving less than a prescribed amount. Territorial courts are included.

2. Naturalization by judicial process.

Steps in naturalization:

(a) The declaration of intention ("first papers").



allegiance to his foreign sovereign.<sup>1</sup> A copy of this document, under the seal of the court, is given to the alien, and must be presented by him when he applies for final naturalization.

After not less than five years' continuous residence in the United States and not less than two years after an alien has filed his declaration of intention, he may take the second step. This involves the filing of a petition for citizenship. It may be presented in any one of the various courts designated by law as having authority over naturalization matters, provided that he has lived within the jurisdiction of this court at least one year immediately preceding the filing of his petition.<sup>2</sup> The petition must be signed by the applicant himself, and must give full answers to a set of prescribed questions. If the alien has arrived in the United States since June 29, 1906, his petition must be accompanied by a document from the United States immigration authorities certifying the time and place of his arrival. In addition, he must, when he files his application, bring forward the sworn statements of two witnesses (both of whom must be citizens of the United States) in personal testimony to his five years' continuous residence and his moral character, and in substantiation of the other claims made in his petition. After this paper has been left with the clerk of the court it must lie on file for at least ninety days, during which notice of its filing is posted. In this interval, also, an investigation of the petitioner's claim is undertaken by one of the federal agents employed for the purpose.

All these formalities having been attended to, the court sets a date for a hearing upon the petition. This hearing must be public, and cannot take place within thirty days preceding any regular federal or state election. Both witnesses must attend the hearing with the applicant, and must answer such questions as may be put to them by the presiding judge, who may also demand from the applicant assurance that he is not affiliated with any organization teaching disbelief in organized government, and that he is attached to the principles embodied in the constitution of the United States. Sometimes the applicants

(b) The filing of a petition for citizenship.

(c) The granting of naturalization or "final papers."

<sup>1</sup> Citizenship may be acquired, however, without formal declaration of intention by aliens who have served a certain term in the United States army or navy and have been honorably discharged therefrom.

<sup>2</sup> These requirements are waived in the cases of persons who, in time of war, are members of the armed forces of the United States.

are given a written or oral examination on American government, in advance of the hearing, by the agent of the bureau of naturalization. If the court is satisfied upon these various points, the judge authorizes the clerk to issue letters of citizenship, or final papers as they are more commonly called, and the alien is thereafter a full-fledged citizen.

Reason for  
the strict-  
ness of the  
present  
naturaliza-  
tion laws.

All this red tape in connection with naturalization procedure comes from the effort to end the various abuses that existed under the provisions of previous naturalization laws.<sup>1</sup> Prior to 1906, when the process of naturalization was simpler and easier, fraudulent admission to citizenship was not uncommon. Sometimes an alien got himself enrolled as a citizen upon the voters' list by means of forged papers; and, since there were so many courts with authority to grant these papers, the detection of forgeries was not easy. More often, crowds of aliens were admitted to citizenship during the days preceding an election, when no careful investigation of their statements was possible. Paid witnesses were sometimes provided by the party managers to take oath as to matters which they knew nothing about. In fact, the naturalization of foreigners became one of the regular activities of the ward boss: the applicant's petition was made out for him, his witnesses were supplied, the foreigner being merely a bewildered participant in formalities which he did not understand. The handling of fifty or sixty naturalizations per hour was not a rare achievement in New York courts before the stricter rules went into force. Under such pressure all careful scrutiny of applications was out of the question; and the voters' lists of the larger cities were regularly padded with the names of persons who had not fulfilled the qualifications at all. Since 1906 these abuses have been almost wholly eliminated.

Citizenship  
by wives  
and  
children.

It is a rule, generally recognized among nations, that the naturalization of a father carries with it the naturalization of all his legitimate children under twenty-one years of age. Likewise the naturalization of a husband makes his wife a citizen. Until a few years ago, therefore, an alien woman (if herself eligible for naturalization) became an American citizen if she married one, and conversely an American woman lost her cit-

<sup>1</sup> Getting naturalized is a more complicated business in the United States than in most other countries. In some countries an alien can be naturalized by merely presenting a single petition to the naturalization authorities; in others the purchase of any real estate operates as a naturalization.

izenship if she married an alien.<sup>1</sup> In 1921, however, Congress abrogated this rule so that marriage no longer operates either to give citizenship or to take it away. This action was unwise and has already resulted in much confusion. One can imagine the complications that are bound to arise in states which have "community property" laws if husband and wife possess different citizenships.

What is the status of a person during the interval between the filing of his first papers and his final admission to citizenship. In filing these first papers he forswears his alien allegiance, but he does not acquire a new one for at least two years thereafter. Meanwhile he is what Edward Everett Hale called "a man without a country." If he goes abroad he cannot obtain a passport from the sovereign whose allegiance he has forsworn, nor can he obtain a regular American passport for he is not yet an American citizen. He can, however, obtain a special form of American passport or travel permit.

Persons  
without  
citizenship.

"Once a citizen, always a citizen." That has been the rule followed by some European countries. And for many years it was the doctrine maintained by the courts of the United States. But it is the rule in America no longer, for Congress in 1907 expressly provided that any American citizen might divest himself of his citizenship by becoming naturalized in a foreign country. Contrary to a popular impression, however, an American does not lose his citizenship by serving in a foreign army or navy unless such service entails foreign naturalization.

Expatri-  
ation.

Are corporations citizens? Not literally so, but for most judicial purposes they are. A corporation is deemed to be a citizen of the state in which it has been organized. A corporation chartered in New Jersey, for example, is by legal assumption a citizen of that state and as such entitled to the equal protection of the laws in all other states.<sup>2</sup> In determining whether a suit to which a corporation is a party shall be brought in the federal courts (in accordance with the constitutional pro-

Is a cor-  
poration  
a citizen?

<sup>1</sup> *Mackenzie v. Hare* (1915) 239 U. S., 299.

<sup>2</sup> The legal doctrine may be briefly stated as follows: The citizenship of a corporation is determined by the citizenship of the persons composing it; but when the corporation receives its charter in a state, the presumption is that its members are citizens of that state, and this presumption may not be rebutted by any averment or evidence to the contrary. See *Mississippi R. R. Co. v. Wheeler*, 1 Black, 286.



vision which gives these courts jurisdiction over controversies "between citizens of different states") the corporation is deemed to be a citizen of the state in which it was chartered. But while it is regarded by the courts as having in many respects the same rights as an individual, a corporation is not a citizen in the full sense of the term, and is not entitled to all the "privileges and immunities" which the constitution guarantees to the individual citizen. It is quite permissible, accordingly, to make reasonable discriminations in the law of any state, between corporations chartered there and those chartered elsewhere, and to give to the former some privileges which are denied to the latter.

The  
equality  
of all  
citizenship  
howsoever  
derived.

American citizens by birth and by naturalization are on a plane of legal equality save in two respects. A naturalized citizen cannot under any circumstances become President or Vice President of the United States. In the second place, a naturalized citizen is not entitled to American protection against claims that may be made upon him by the country of his former allegiance if he goes back to that country. But he will be protected so long as he stays in the United States. And even aliens in the several states of the Union are entitled to the "equal protection of the laws." Apart from such things as the right to protection abroad, the right to hold office, and the right to vote, the legal position of the alien in the United States does not differ widely from that of the citizen. The alien pays taxes like a citizen; he may sue and be sued in the courts; may own property, may earn a livelihood, send his children to the public schools, and be generally protected in his right to life, liberty and the pursuit of happiness. So long as he behaves himself he is not reminded of his alienage—save on election day.

The  
citizen's  
constitu-  
tional  
rights.

What are the "constitutional rights" of the American citizen? We hear much about such rights—frequently from people who could not make the barest enumeration of them. And in truth it would be a difficult task to make an accurate list. The constitution, including its amendments, names a considerable number of rights which must not be denied, impaired, or abridged; but this enumeration is not intended to be complete. On the contrary it expressly declares that the mention of certain rights shall not be construed to deny or disparage others. The state constitutions, moreover, are prolific in their assertion of constitu-



tion rights pertaining to the citizen, but here again the enumeration is not intended to be all-inclusive. So we have nowhere a complete statement of just what the rights of an American citizen are, or what they are not. The best constitutional lawyer in the country would find it hard to compile such a list and make it accurate.

Many things are spoken of as "constitutional rights" which are not such at all. The right to vote, so termed, does not pertain to all citizens. It pertains only to those who satisfy various other requirements which differ from state to state. The Supreme Court has made it clear, on more than one occasion, that "the constitution of the United States does not confer the right of suffrage on anyone."<sup>1</sup> It merely declares that the suffrage shall not be denied on certain grounds which it expressly enumerates, namely, race, color, previous condition of servitude, or sex. But it may be denied for lack of age, residence, literacy, or even property.

Suffrage is not one of them.

There is no constitutional right, moreover, to hold public office, to serve on a jury, to practice law, to be a policeman, or to drive a motor car on the public highways. The laws determine, in all such cases, what the qualifications shall be. The popular mind confuses *rights* and *privileges*. It uses one term when it means the other. But there is a world of difference between the two, as anyone can readily ascertain by consulting a dictionary.

Nor is office-holding.

The rights of the citizen are formulated, first, in a series of limitations which the national constitution contains, some of them in the original document and some in the articles of amendment, particularly in the first eight amendments which, taken together, are commonly called the Bill of Rights. These rights, as there stated, include the right to be immune from punishment by any bill of attainder or ex post facto law, to have the privilege of the writ of habeas corpus except when the public safety may require its suspension, to enjoy freedom of worship, freedom of speech, freedom of the press, freedom to assemble peaceably, and freedom to petition the government for the redress of grievances. They include likewise the right to keep and bear arms when so authorized by the militia laws of any state, to be immune from the billeting of soldiers except

The inalienable rights secured (1) by the national constitution.

<sup>1</sup> *Minor v. Happersett*, 21 Wallace, 162.

in time of war<sup>1</sup> and then only in a manner prescribed by law, to be secure in person and in home against unreasonable searches and seizures and from the issue of search-warrants without probable cause supported by oath, to be given in the federal courts, all manner of judicial protection including securities against trial for any serious crime except upon action of a grand jury, and against being twice placed in jeopardy for the same offence, to be assured a speedy and public trial by jury, to be informed of charges, confronted with witnesses, to have the assistance of counsel, to have jury trial also in important civil cases, to be free from the requirement of excessive bail and not to be subjected to any cruel or unusual punishment. Finally, they comprise the right to be free from bondage or involuntary servitude save as a punishment for crime; the right to be protected in life, liberty, or property unless deprived thereof by due process of law, and to receive in all parts of the Union the equal protection of the laws.<sup>2</sup> In addition the citizen has the right to pass freely from state to state, to acquire a residence in any state and to be accorded the same privileges as those who are already residents there, to sue and be sued in the courts, to own property, and to carry on any legitimate business in accordance with the general limitations laid down by law.

This long enumeration of rights guaranteed by the constitution does not form a complete catalogue of them all, but only of the fundamental ones. It does not, as has been said, preclude the citizen from retaining and asserting others.<sup>3</sup> Taken together

<sup>1</sup> Colonel Theodore Roosevelt, Jr., in writing of his experiences as a billeting officer in France says, "I knew nothing about billeting except that it was forbidden by the constitution of the United States." *Average Americans* (New York, 1920). He should have added "except in time of war"—which is a highly important exception.

<sup>2</sup> For an explanation of "due process of law" and its history see *below*, pp. 348-349.

<sup>3</sup> The Supreme Court has never, in any of its decisions, attempted to make a definitive list of the citizen's constitutional rights. The nearest approach to its doing so was in the *Slaughter House Cases* (16 Wallace, 36) where it mentioned the right "to demand the care and protection of the federal government over his life, liberty and property when on the high seas, or within the jurisdiction of a foreign government; to peaceably assemble and petition for the redress of grievances, the privilege of habeas corpus; to use the navigable waters of the United States however they may penetrate the territory of the several states; all rights secured to citizens by treaties with foreign states . . . the right on his volition to become a citizen of any state of the United States by a *bona fide* residence therein, with the same rights as other citizens of that state."

these guarantees form, nevertheless, a large portion of the general category known to students of American government as "constitutional limitations." The exact scope of these limitations, however, will be the theme of a later chapter.<sup>1</sup>

Then there are the rights guaranteed by the constitutions of the several states, and the limitations imposed by these constitutions on the state legislatures. Their name is legion; it would take a whole volume to enumerate them all. They duplicate the rights and limitations named in the national constitution, but in many cases go a good deal farther. No right conferred by the national or state constitutions, however, is indefeasible—as will be explained later. The right of free speech does not imply the liberty of every citizen to say what he pleases, regardless of its truth or falsity. Even "constitutional rights" must be safeguarded against abuse.

(2) by the state constitutions.

Unhappily we hear too much about the rights of the citizen and not enough about his duties. Yet every right, of whatever sort, carries a responsibility along with it. The right to vote (if it is called a right) involves the duty to vote. The right to be protected carries with it the duty of helping to make the government able to protect. A country worth having is a country worth serving. The right to sue in the courts carries with it the duty of abiding by their decisions. Rights and duties interlock.

Correlation of rights and duties.

What, then, are the more obvious duties of the citizen? They are not set forth in the constitution, it is true, but they are implied in the very nature of free government. The citizens of a democracy who act upon the assumption that popular government prefigures rights alone will in time have no rights worthy of the name. Popular government implies not only government for the people but government by the people. The latter makes large demands in the way of patriotism, self-sacrifice, public spirit, intelligence, and activity. No one, therefore, should fix his eyes upon his rights to the derogation of that equally important factor in free government, his duties.

The constitution of the United States, for example, guarantees to every citizen that he shall have the privilege of living under a "republican form of government." But this guarantee will

<sup>1</sup> Below, Ch. xxi.

Proper performance of civic duties is essential to good government.

mean much or little as we choose to make it. A government may be republican in form and yet be a very bad government, autocratic, inefficient, and corrupt. All the governments of Central and South America are republican in form, yet most of them have never been popular governments and some are nothing but guerilla dictatorships. A republican form of government will provide and preserve the blessings of liberty to such extent as its citizens may entitle themselves by the intelligent and loyal performance of their civic duties. "Every nation," somebody once wrote, "has as good or as bad government as it deserves." There is a good deal of truth in that saying. The excellences of a constitution or of laws will avail little if the actual machinery of government be not built upon a sound conception of the citizen's individual obligations. The world has never yet manufactured a successful democracy out of popular indifference.

Some outstanding duties of the citizen in a free land.

The duties of the citizen in a free land are too numerous and too varied to be set down on the pages of any man's book.<sup>1</sup> They form a great host, which no man can number. But the ones that are most commonly forgotten will bear reiteration. The duty to know his country's history and to be proud of it; to understand his own government and to honor it; to know the laws and to obey them; to be respectful of all duly constituted authority; to be loyal in action, word, and thought; to look upon the privilege of the suffrage as a sacred thing and to use it as becometh a sovereign prerogative; to bear his portion of the common burdens cheerfully; to serve in public office at personal sacrifice and to regard it as a public trust; to fight and die if need be in the nation's cause—these are the first obligations which a free government imposes upon its citizens. This vision of his civic duty must be always before the citizen's eyes, for where there is no vision the people perish.

<sup>1</sup> The reader who is interested in this theme will find it discussed in Chief Justice Taft's *Four Aspects of Civic Duty* (New Haven, 1911), S. W. McCall's *Liberty of Citizenship* (New Haven, 1915), and Lord Bryce's *Hindrances to Good Citizenship* (New Haven, 1906).



## CHAPTER VII

### THE CITIZEN AND HIS POLITICAL PRIVILEGES

Suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the state itself.—*Thomas M. Cooley.*

Having surveyed the rights of the American citizen we can now discuss one of his most important privileges. "Whether voting is a right or a privilege," it has sometimes been said, "is a merely academic question, of no practical importance."<sup>1</sup> But the distinction is not merely academic; it is deeply bedded into the laws of the land. The difference between the citizen's rights and his privileges is this: A right is established by the constitution or the laws for the benefit of the citizen. Its nature and scope are determined by looking at the matter from his point of view. The right to be free from arbitrary searches and seizures is an example. A privilege, on the other hand, is something that is bestowed on the citizen, not for his own benefit (although it may incidentally please him) but for the well-being of the whole community. Its nature and scope are determined from that point of view. The privilege of serving on a jury is not conferred upon individuals because people like to sit in a jury box listening to the verbosity of lawyers. It is because the public well-being demands that the privilege be extended and the obligation imposed. When a man says that he has a "right" to make arrests, or to perform marriage ceremonies, or to take affidavits, he does not mean what he says. What he means is that the government, in the interest of the common welfare or convenience, has bestowed upon him a privilege which it does not bestow on everybody.

No one can acquire a vested interest in his privileges as a citizen. If the law takes away the privilege of voting from

The distinction between rights and privileges.

There is no vested interest in privileges.

<sup>1</sup> J. A. Woodburn and T. F. Moran, *The Citizen and the Republic* (New York, 1918), p. 12.

those citizens who are illiterate, it gives them no compensation. When a constitutional amendment or a law abolishes an office before the incumbent has served the full term for which he was elected it does not deprive him of a right, because he had no "right" to hold public office in the first place, but only a privilege, and a privilege can be withdrawn at any time. There is no such thing as having property rights in the tenure of a public office. But the citizen can have property rights in land, buildings and goods—rights which the law cannot take from him without just compensation. It is true, of course, that the line between rights and privileges is not always easy to draw; there are some things that stand on the border line, but in general the distinction is clear enough.

The most widely-accorded political privilege of the citizen — The suffrage.

The most widely-accorded political privilege of the American citizen is that of voting. It is a privilege that is not accorded to all citizens, but only to some of them. Counting persons of all ages, colors, and degrees of literacy, there are more than ninety million American citizens—but less than forty million are voters. Between citizenship and the suffrage there is, in fact, no absolutely essential connection. Citizenship is a federal matter. The national government determines, under the constitution, who shall be eligible for naturalization and how they shall be made citizens. But the states determine who shall vote, even at national elections. The states are not free to make any rules they please on this point; they are forbidden to deny the suffrage on certain specified grounds (namely, race, color, previous condition of servitude, or sex), and they must also (for congressional elections) establish the same suffrage requirements that exist for elections to the larger branch of the state legislatures; but even with these restrictions they have a good deal of discretion left to them. They can, if they desire, provide that no one may vote unless he is able to recite the constitution from memory, or sing the high notes in the Star Spangled Banner, or go through the manual of arms. And the states have, in fact set up different requirements for voting. That is why the requirements for voting at presidential elections are not uniform throughout the United States. A citizen may be a voter in Pennsylvania, when under exactly the same conditions he would not be permitted to vote in Massachusetts—at the same presidential election.

Why the American suffrage is not uniform.

If the framers of the federal constitution had regarded the suffrage as one of the unalienable rights of the citizen they would doubtless have established manhood suffrage for all national elections. But they were faced with the fact that every one of the thirteen states regarded the suffrage as subject to restriction and that all of them had placed varying limitations upon its exercise. So they left the whole matter to the states for decision. And for more than twenty years the states made little change in their requirements. Several new states entered the Union, but most of them came in with property or tax-paying qualifications in their first constitutions.

The constitution and the suffrage.

The great extension of the suffrage came during the period 1815-1850. It was part of the Jacksonian movement and surged out of the West. Conditions of life in frontier regions always make for the spread of equalitarian ideas. A man is a man on the frontier if he can survive the struggle for existence. And he is as good as any other man. The new western communities, therefore, gave every man a vote, and every man a right to hold office. Some of them, indeed, gave the suffrage to aliens as well as citizens. This equalizing movement, moreover, did not confine itself to the new West. It crossed the Alleghanies to the older states and stamped its imprint there. Everywhere the suffrage was liberalized by the abolition of property qualifications, tax requirements, and religious tests. By 1850 manhood suffrage was the rule in all but a very few states, and even these joined the procession a little later.

The coming of manhood suffrage.

But manhood suffrage, as most of the states understood it, did not include the negro. With the exception of Maine, Vermont and Rhode Island this was true of North and South alike. There was no general demand for an extension of the suffrage to the negro until after the Civil War. Then arose the question whether it should be guaranteed to the freedmen. Congress, by the Reconstruction Act of 1867, imposed negro suffrage upon states of the former Confederacy and three years later the fifteenth amendment forbade the denial of voting rights to any citizen, by any state, on the ground of "race, color, or previous condition of servitude."

The negro suffrage problem.

The fifteenth amendment.

To enact such a prohibition has proved easier than to enforce it. For a time the national government applied coercion to the southern states but it was effective only so long as it was backed

It has not been effective.

by federal troops and not always even then. Since 1877, when the troops were withdrawn, the southern states have successfully managed to evade, circumvent, and render wholly ineffective the provisions of the fifteenth amendment. At first they did it by Ku-Klux methods, intimidating the negro into abstention from the polls. But there developed among the white population of the South a feeling that these rough-handed methods could not go on forever and that the actual disfranchisement of the negro ought to be "legalized" by some process which would respect the letter, even if it ran counter to the spirit, of the fifteenth amendment. How to do this, and still keep from colliding with the federal authorities has given them some trouble; but they have managed it. The artifices which they have used to disfranchise the negro are interesting, and a few of them ought to be briefly described, if only for the purpose of showing how the law of the land gives way before a strong public sentiment.

Methods of  
evading it.

The fifteenth amendment, be it noted, does not forbid the denial of voting rights on the ground of illiteracy. And since large numbers of negroes are illiterate this loophole seemed to offer the most practicable avenue of negro disfranchisement. But the southern states contain many illiterate white persons also, and the problem thus becomes one of keeping the illiterate negro out while letting the illiterate white man in.

The liter-  
acy test  
and the  
"reason-  
able inter-  
pretation"  
alternative.

Mississippi led the way, in 1890, by establishing among other qualifications for voting, the requirement that every voter must be able to read any section of the state constitution, or, as an alternative "to give a satisfactory interpretation thereof." The opportunity for discrimination came, of course, in the applying of this test, which was turned over to white officials. The white voter, although he may not always be able to read, is always able to expound—at least to the satisfaction of officials who are of his own color. But the illiterate colored man, who sets out to give a satisfactory interpretation of the provision that "the privilege of the writ of habeas corpus shall not be suspended," for example—well, the outcome can be left to the imagination of anyone who knows the southland. The Supreme Court of the United States, when called upon to pronounce on the constitutionality of this provision, declared that it did not establish a discrimination on the ground of race, color, or previous condition



of servitude.<sup>1</sup> The court seems to have placed more stress on the wording of the requirement than on the intent of those who framed it or the methods of those who enforced it. Its action is hard to reconcile with the sound doctrine which the court enunciated in another case involving racial intolerance.<sup>2</sup>

A second plan, which seemed to have the advantage of greater simplicity, involved the insertion of a "grandfather clause" in the requirements for voting. South Carolina inaugurated this plan in 1895 by providing that the literacy test need not be applied to any citizen who was qualified to vote, or *whose ancestors were qualified to vote*, in any country prior to 1867. Now since all white persons, presumably, had such ancestors, and all negroes had not, this arrangement worked automatically. Other states followed South Carolina's example. One of them, Louisiana, made provision for a property qualification but added the grandfather clause as a means of circumvention for white persons who owned no property.

The grandfather clause.

But the grandfather clause was too much for the gowned gentlemen who sit on the supreme bench at Washington. They ruled that it was an evasion of the fifteenth amendment and held it unconstitutional.<sup>3</sup> By this time, however, the clause had accomplished the major part of its purpose, for it had put all illiterate white citizens, over twenty-one years of age, on the voting lists. All that became necessary was to provide by law that any man's name, once on the list, should stay there.

Declared unconstitutional.

There is also a way of actually permitting the negroes to vote but depriving them of all real share in the selection of representatives. This is made possible by the system of party organization. Practically all the southern states are overwhelmingly Democratic. The candidates who receive the nomination of that political party are certain to win at the polls, hence the real fight is for the nomination. The plan pursued in some of these states, therefore, is to exclude negroes from voting at the primaries where the real contest takes place. Each state has full power to determine who shall be enrolled as members of a political party and hence entitled to a share in the selection of the party candidates. The fifteenth amendment does not

Exclusion of negroes from the primaries.

<sup>1</sup> *Williams v. Mississippi*, 170, U. S. 213 (1898).

<sup>2</sup> *Yick Wo v. Hopkins*. See below, p. 442.

<sup>3</sup> *Guinn v. United States*, 238 U. S. 347 (1914), and *Myers v. Anderson*, 238 U. S. 368 (1914).

forbid the exclusion of anyone from membership in a political party by reason of race or color.

Other  
methods of  
keeping  
negroes  
from the  
polls.

Finally, if worst comes to the worst, the colored citizen can be given full voting rights by the state constitution but actually debarred when election day comes. He can be compelled to produce his poll tax receipt (which he has lost or forgotten to bring); he can be bawled out and bullied by the polling officials; he can be warned to keep away—and he will usually do it. The number of negroes who actually vote in the thirteen distinctly southern states is relatively small. The fact is that most colored men and women in the southern states do not care a great deal whether they vote or not. When the negro wage earner or small farmer realizes that in order to qualify as a voter he must pay a poll tax he begins to lose interest in the idea. The whole question would soon cease to engender bitterness were it not periodically stirred up by equalitarian crusaders of both colors. The fifteenth amendment was adopted at a time when emotion rather than cool judgment controlled the mind of the nation, and action taken under such conditions rarely proves wise.

The issue  
of woman  
suffrage.

Among the nineteen amendments which have been added to the constitution of the United States, two deal with the suffrage (the fifteenth and the nineteenth), both by way of prohibiting its denial on specified grounds. The nineteenth amendment, which became effective in 1920, resulted from an agitation which went on with varying degrees of intensity for over a hundred years. "The natural right of women to the ballot," says one of my colleagues, "is deduced from the fundamental principles of American government."<sup>1</sup> If so, it took the American people a very long time to make a deduction from the fundamental principles in this case.

Beginnings  
of the  
movement.

The agitation for woman suffrage began in the reign of Andrew Jackson, or even earlier. Prior to the Civil War it made no headway, for legislators could not be brought to take it seriously. The agitation for "woman's rights" merely furnished the theme of perennial jokes, cartoons, and humorous ditties. But, when the Civil War was over, the movement began to make some progress and the first actual grant of full suffrage to

Its prog-  
ress from  
1869 to  
1914.

<sup>1</sup> A. N. Holcombe, *State Government in the United States* (New York, 1916), p. 85.

women was made by the territory of Wyoming in 1869. The privilege was continued when the territory became a state in 1890 and during the next ten years Colorado, Idaho, and Utah went over to equal suffrage. Other states did likewise, one by one, during the next two decades until there were about a dozen woman suffrage states in all.

But the leaders of the movement lost patience with the process of winning the states one by one. Hence they diverted much of their energy to promoting an amendment to the national constitution which had been slumbering for many years in the files of Congress.<sup>1</sup> Congress responded to their pressure in 1919, passed the proposed amendment, and sent it to the states for ratification. The result afforded an illuminating example of the speed with which the constitution can be amended when the people want any amending done. The necessary three-fourths of the states ratified the nineteenth amendment in a little more than a year.

The nine-  
teenth  
amend-  
ment.

This is hardly the place to recapitulate the arguments for and against woman suffrage which were dinned into the ears of the American people for a century or more. The issue is now settled so far as the United States is concerned,—settled for good, and doubtless settled right. What the result has been there is no certain way of determining, for the ballots cast by men and women are not kept separate. Yet there is every reason to think, from the superficial indications, that the extension of the suffrage to women has made no substantial change in the electorate, whether for good or ill. It has practically doubled the voting lists throughout the country, made the registration of the voters and the holding of elections more expensive, made it necessary for candidates to reach twice as many voters with their propaganda, and put a double strain upon the whole electoral machinery. On the other hand, it has made twice as many people contented with their electoral status, and has removed an irrelevant issue from American politics. Sex has no more right to be an issue in politics than has race, or color, or religion. The extension of the suffrage to women has undoubtedly developed among them a more vital interest in public affairs. Despite all predictions to the contrary, women seem to be using

Results of  
woman  
suffrage.

<sup>1</sup> Known as the Susan B. Anthony amendment. It was first proposed in 1869.

the ballot exactly as men have used it,—with just as much intelligence, independence, and devotion to the common weal. They appear to be susceptible to exactly the same influences, both good and bad. Woman suffrage has worked no revolution in American politics. It has not put the bosses to flight or shattered the rings, or made the politicians walk in the straight and narrow way. Neither has it, on the other hand, softened the masculinity of New World politics, or substituted government by the heart for government by the head, as some opponents predicted it would do. Is it not a tribute to the American man that the American woman, when given full power to do differently, decides by preference to do just what he has been doing?

The question of a general literacy test.

Controversies as to who shall have the privilege of voting are not yet at an end. The question of debarring all illiterates, of whatever sex or color, is now having much discussion and is likely to have more. Twelve states, outside the South, now apply a literacy test.<sup>1</sup> Of these some require that voters shall be able to read; the others insist that they shall be able both to read and to write. New York is the most recent addition to this list, having established a literacy test in 1922, by means of an amendment to the state constitution. All new voters in New York are now required to read a 100-word excerpt from the state constitution and to write at least ten words in English.

The arguments for and against it.

The adoption of a literacy test is strongly opposed, as a rule, by the practical politicians. They argue that a man's political interest or intelligence is in no way related to his education. They point out that men who can neither read nor write are required to pay taxes, to serve in the army when called upon, and to perform other public obligations. The right to vote, they assert, is a "natural right" and should not be made dependent upon race, religion, social status, wealth, or education. The trouble with this argument is that it approaches the matter from the standpoint of the individual, not from that of the whole community. The privilege of voting, as has already been said, is one which the community confers for its own benefit and not for the satisfaction of the individuals concerned. The real question is whether the giving of the ballot to illiterates is best

<sup>1</sup> Arizona, California, Colorado, Connecticut, Maine, Massachusetts, New Hampshire, New York, North Dakota, Oklahoma, Washington and Wyoming.



for the people as a whole. To this question there can hardly be but one answer. Giving a ballot to a man who cannot read it is a travesty on free government. And this is particularly true in states which use the initiative and referendum. Literacy is not a luxury in America, with free day-schools for children and free evening-schools for adults. No illiterate alien can now be naturalized. No illiterate, in most states, is allowed to serve on a jury. Illiterates were drafted into the United States army during the World War, it is true; but they were taught to read and write before they left the army.<sup>1</sup>

The exclusion of illiterates, if it becomes the general policy throughout the United States, will undoubtedly improve the quality of the electorate, especially in the larger cities. In some cases it would make a shrinkage of eight or ten per cent in the present voting lists. It would eliminate the element that is most easily exploited by the political bosses. But let no one imagine that the mere imposition of a literacy test will work any miracle in the government of nation, state, or city. Boston has had a literacy test for more than thirty years, but it is not a better-governed city than Detroit or Cleveland which have no such tests at all.

The probable result.

Some states still maintain a tax qualification for voting. In Pennsylvania every voter, twenty-two years of age and upward, must have paid a poll tax within two years preceding the election. In Massachusetts all male voters must show that they have been *assessed* for a poll tax during the current year. Several southern states require the payment of a poll tax but use the requirement, for the most part, as a means of excluding colored citizens from voting.<sup>2</sup>

Tax qualifications for voting.

There are some who believe that nobody should be given the right to vote unless he (or she) contributes something to the public treasury by way of property tax, income tax, poll tax, or some other form of tax. Why, they ask, should people have a voice in determining the expenditure of public money if they

Are they justified?

<sup>1</sup> This does not include, of course, the men who were drafted in the closing months of the war and who were discharged before there was time for them to master the rudiments.

<sup>2</sup> The usual provision is that those who apply for registration as voters must produce their poll-tax receipts. But the tax collectors make it a point to give negroes no receipts unless they insist upon them, and in any event, most colored poll-tax payers neglect to keep the receipts when they get them.

contribute not a penny of it? But this question takes too much for granted. It carries the implication that the only people who pay taxes are the ones who pay directly. What about the *indirect* taxpayer? He who pays rent, pays taxes. He who buys goods, pays taxes. Taxes are an increment in the price of everything. Every bill that a man pays is, in part, a tax bill. There is no real basis for any distinction between taxpayers and non-taxpayers. Those whom we call taxpayers are only middlemen for the rest of us. The landlord groans when taxes go up, as though the increase came out of his own pocket. It is his tenants who ought to do the groaning, for sooner or later the increase will work its way into the rent. The saying that there are only two absolutely sure things on earth, namely, death and taxes, has more truth than humor in it. Taxes come with unerring certainty to every man, whether he knows it or not. There is no justice, therefore, in maintaining a requirement that only "taxpayers," in the narrower sense, shall have the right to vote.

Other  
qualifica-  
tions for  
voting.

No state in the Union has granted universal suffrage in an absolute sense. All of them now insist upon citizenship as a qualification; until recent years there were several states which allowed aliens to vote if they had declared their intention of becoming citizens.<sup>1</sup> The voting age is twenty-one everywhere. All the states prescribe a certain minimum of legal residence, usually six months or a year. Legal residence does not always mean actual residence. It is possible, under certain conditions, to maintain a legal residence in a state or city while actually living, perhaps for several years, somewhere else. President Woodrow Wilson, for example, remained a legal resident of Princeton, N. J. (and a voter there), for eight years although he never came to the place except on election days.

Disquali-  
fications.

There are certain disqualifications which also ought to have mention. These include conviction for certain serious crimes. Election frauds are sometimes penalized by permanently disfranchising those convicted of them. Some states debar from voting all soldiers, sailors and marines in the active service of the national government. Insane persons and those confined in certain public institutions of incarceration are also barred.

<sup>1</sup>Thirty years ago there were sixteen such states. One after another they have made citizenship essential.

Indians on government reservations are not "citizens" in the eyes of the law and hence do not vote. Legal residents of the District of Columbia are not disqualified from voting, but they never vote because no elections are ever held in the District.

Every state makes provision in its own constitution and laws for the enrolment of voters and the compilation of voting lists. No such lists are prepared by the national government or under its supervision. The state lists are used at national elections. As for the methods of enrolling voters, there are considerable variations from place to place, but as a rule the work is deputed to the local authorities in counties, cities, towns or townships. There is a registration official or board of registrars which does the work. They receive applications for enrolment, make up the list, and revise it prior to each election.<sup>1</sup>

Compiling  
the voters'  
lists.

<sup>1</sup>For a survey of the history of the suffrage in the United States the most useful book is Kirk H. Porter's volume, which bears that title (Chicago, 1918). The existing suffrage requirements in the various states are tabulated, from time to time, in the *World Almanac*. The methods of compiling the voters' lists, especially in cities, are described in a pamphlet on *Methods of Registering Voters*, issued by the Chicago Bureau of Public Efficiency in 1923.

## CHAPTER VIII

### THE PRESIDENT

The constitution gives the President wide discretion and great power. It calls from him activity and energy. He is no figurehead.—*William H. Taft.*

The need of a single executive.

In the Articles of Confederation there was no provision for a chief executive. The Congress of the Confederation chose its own presiding officer, but he had no executive powers, and such executive work as could not be performed by the congress itself was deputed either to specially appointed officials or to committees. This arrangement proved far from satisfactory as anyone who reads Washington's letters will learn, and the framers of the constitution agreed that in the new government a strong and separate executive was necessary. Their experience during the years prior to 1787 had clearly taught this lesson, for the need of a supreme guiding hand had been sorely felt on many occasions during the critical days of the Revolutionary War. And there was good American precedent for a single executive in that all the states had governors. So the decision to have a President was reached without much difficulty. But how the executive should be chosen, whether he should be independent of Congress or not, and what powers he should have—these matters were not so easily decided.

The presidential term.

As to the proper term, method of selection, powers, and functions of the executive there were, at the outset, nearly as many different opinions as there were delegates. Hamilton expressed a preference for life tenure; the other delegates were for terms ranging from two to twelve years. After a good deal of discussion they agreed on a seven-year term, with a provision against re-election; then they reconsidered the matter and ultimately fixed the term at four years with the proviso against re-election omitted.

His position in relation to Congress.

Even more difficult was the problem of how to choose the President. Most of the delegates favored a proposal to let



Congress choose the President, and that plan was provisionally adopted. But later on, when the convention became convinced that this arrangement would virtually destroy the whole system of checks and balances, the question was reopened and finally settled in an entirely different way, namely, by the expedient of indirect election. There were a few who favored direct popular election, but the majority were unalterably opposed to that plan, regarding it as the open door to the choice of demagogues and perhaps, eventually, to the usurpation of monarchical power. The fear that somehow or other a monarchy might grow out of the new national government haunted the delegates at every turn, and they were desirous of guarding against such a possibility in every practicable way. On the other hand, they were equally disinclined to set up a mere paper executive with the functions of a figurehead. They did not want to make the head of the nation a mere creature of Congress, incapable of effective leadership. What they did, therefore, was to give the President a position of reasonable independence with powers which they deemed to be adequate in normal times and which might be considerably expanded if emergencies should arise.<sup>1</sup>

What was the mechanism finally adopted by the convention for securing the choice of the President? It is relatively simple and allows a large degree of latitude to the states. Briefly, the constitution (as it finally left the hands of its framers) provided that each state should "appoint" in "such manner as the legislature thereof may direct" a number of "electors" equal to the state's combined quota of senators and representatives in Congress. A state having, for example, two senators and five representatives was thus to choose seven electors. In due course these electors were to meet, each group in its own state, and were to give their votes in writing for two persons, of whom both should not be inhabitants of the same state as the electors. The ballots were then to be sealed and transmitted to the president of the Senate, who was directed to count them in the presence of both Houses and to announce the result. The person receiving the most votes was to be President and the one obtaining the next highest number was to be declared Vice President.

The original method of choosing the President.

<sup>1</sup>The development of the presidential office is fully discussed in Edward Stanwood's *History of the Presidency* (2 vols., Boston, 1916).

Where it  
came  
from.

The adoption of this mechanism, as has already been pointed out, was the result of a compromise. It had the merit of satisfying those who opposed direct election by the people and yet did not want the President chosen by Congress. The idea seems to have been derived from Maryland where the fifteen members of the upper House in the state legislature were chosen by electors in each county. These electors, in turn, were elected by the people. In Maryland this plan was said to be working satisfactorily.

Motives  
which  
dictated  
the selec-  
tion of  
this mech-  
anism.

At any rate the motives which the delegates had in mind when they adopted the device of an electoral college were made clear during the debates in the constitutional convention. One and all they believed that the selection of the nation's chief executive officers should be made solemnly and with deliberation, by those who would be certain to reflect the intelligence and patriotism of the whole citizenship. It was their hope and expectation that the electors would be men of high repute in their respective states and that the function of choosing the President would be left to them with complete confidence by the people.

How it  
worked in  
the earliest  
elections.

For a time it seemed as though the people were of similar mind. When the provisions of the constitution were first made public there was an almost unanimous approval of the ingenious plan for indirect presidential elections. Almost every other provision of the constitution was assailed by someone; but this one seems to have drawn no serious criticism. And in the first two elections the scheme functioned exactly as its originators intended.<sup>1</sup> Then a different course began to shape itself. At the third election (1796) it was well understood, even before the electors met, that most of the electors would vote for either John Adams or Thomas Jefferson, although in no case were any pledges exacted. In 1800 things were carried a step further. Two well-defined political parties had now arisen, and at the election of that year both put forth their candidates. Electors were chosen upon the understanding that they would vote for the nominees of their party. So every elector (with a single ex-

The  
change in  
1796 and  
1800.

<sup>1</sup> In 1789 and in 1793 all the electors voted for Washington (thus making him the unanimous first choice) but their second choices were well scattered, thus indicating that they were using their individual judgment and were not being pledged in advance.

ception) voted on this occasion either for Jefferson and Burr or for Adams and Pinckney. The function of deliberation so far as the electors were concerned thus became a fiction; henceforth the electors were to serve as mere automatons, selected because they would do what they were told to do. The heart of the original plan was thus cut out within ten years, and never since has there been any serious attempt to restore it.

The people, not the electors, have been choosing the President and the Vice President for more than a century. They have been doing precisely what the framers of the constitution did not intend them to do. The voters go to the polls every four years and record their votes for one or the other of the candidates whom the political parties have nominated. The electoral college has become a rubber stamp. Yet it continues to go through its gestures with as much solemnity as though it were exercising a sovereign function. Why is it not abolished? The answer is that the people, thus far, have not thought its abolition worth the trouble involved. It could only be abolished by adding another amendment to the constitution, and this would involve a lot of work on somebody's part. A practical people cannot easily be roused to enthusiasm over the abolition of something because it serves no useful purpose, if, by the same token, it serves no very harmful one.

The election of 1800 was also significant in that it disclosed a serious flaw in the constitution as the framers worded it. The constitution in its original form provided that the electors should vote for "two persons" without designating which was the elector's choice for President and which for Vice President. In 1800 Thomas Jefferson and Aaron Burr each received an equal number of votes. Both candidates had been put forward by the same political party with the intention that Jefferson should be chosen President and Burr Vice President; but every Democratic elector, in accordance with what he believed to be his duty, voted for both. The result was that both received "the highest vote" which according to the constitution was to determine the choice of a President, and neither obtained the "second highest" which was to designate the Vice President-elect. Now the constitution was foresighted enough to make provision that in case of a tie the House of Representatives should determine the choice, and the House did so, choosing

Results of  
this  
change.

A defect  
in the  
original  
plan.

The  
Jefferson  
Burr  
mix-up.

Jefferson President after an exciting contest in which the Federalists came within an ace of turning the Democratic slate end for end. To have made a President out of Aaron Burr would have been something of a calamity. The episode proved, moreover, that under the party system a tie vote might often occur and that a change in the method of voting would be advantageous. In 1804, therefore, the twelfth amendment was added to the constitution providing, among other things, that thereafter the electors in the several states should "name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President."

The  
indecisive  
election  
of 1824.

During the next seventy years presidential elections were held without any trouble of a serious nature. In 1824, it is true, no candidate for President received a clear majority of the electoral votes, and the House of Representatives once more had to make a choice. There was some talk of again changing the mechanism of election, but nothing was actually done. Through the political tumults of the Civil War period the system worked without mishap. It was not until the election of 1876 that a perplexing difficulty arose. From several states, on that occasion, two different sets of electoral votes were received. Who should determine which of these sets should be counted and which rejected? The constitution had not anticipated any such eventuality; there was nothing in the laws, either of the United States or of the states themselves, to provide a satisfactory answer. If the president of the Senate, whose duty it was to open and count the votes, should accept one set of returns from the disputed states, the election of Rutherford B. Hayes, the Republican candidate, would be assured; if he should accept the other, the election would go to Samuel J. Tilden, his Democratic opponent. To make matters worse, Congress was itself divided. The Senate was Republican and the House Democratic. The joint rules of the two Houses provided that no disputed electoral return should be counted unless both the Senate and the House of Representatives, acting separately, should concur. In this case, of course there was no possibility of their concurring. Here was a situation that might lead to grave trouble. In most of the Latin-American republics it would be a certain prelude to the clash of arms. But the statesmen of the Republican and Democratic parties put their heads together and found a

The Hayes-  
Tilden con-  
troversy.



peaceful, if not an amicable, solution.<sup>1</sup> It was agreed to create a special electoral commission of fifteen persons, five senators chosen by the Senate, five representatives named by the House, and five justices of the Supreme Court. This commission was to decide which sets of votes should be counted. The commission was duly constituted; it heard both sides of the controversy; and its rulings determined the election of President Hayes.<sup>2</sup>

How it  
was  
settled.

While the matter was eventually settled in this way without disturbance, the situation was fraught with danger for a time and Congress sought to make sure that a controversy of the same sort should not occur again. How to do this, whether by an entire reconstruction of the plan of election (which would require an amendment to the constitution) or by merely making clear the procedure in cases of doubt (which could be done by law), was much discussed for some years. In 1887 Congress chose the latter alternative and enacted a statute dealing with the subject of disputed votes. This law is still in force. In general each state must now determine, in accordance with its own laws, any disputed questions concerning the choice of presidential electors from that state. If in New York, for example, two groups of electors claim to have been chosen at the polls, the laws and courts of New York must settle the dispute before the votes of either contesting group can be counted.<sup>3</sup>

Its  
sequel—  
the act of  
1887.

From neither the constitution nor the laws, however, can one get an adequate idea of the way in which the President of the United States is actually chosen.<sup>4</sup> The constitution provided three steps—the choice of electors, the voting by electors, and

The present  
method of  
election.

<sup>1</sup> P. L. Haworth, *The Hayes-Tilden Disputed Presidential Election* (New York, 1906).

<sup>2</sup> Of the 369 electors, 184 were pledged to Tilden (Democrat), 164 to Hayes (Republican), and 21 votes were in dispute, namely, those of South Carolina, Florida, Louisiana, and one from Oregon. To the electoral commission the Senate appointed three Republicans and two Democrats, while the House of Representatives appointed three Democrats and two Republicans. Of the five Supreme Court justices, three were Republicans before their appointment to the bench and two were Democrats. Thus the electoral commission, as finally constructed, contained eight Republicans and seven Democrats. All, however, took an oath to decide the issue on its merits and impartially. On every disputed question, nevertheless, the commission divided on straight party lines and gave the entire twenty-one disputed votes to Mr. Hayes.

<sup>3</sup> Congress retains the power to reject the returns from any state when, in the opinion of both Houses, there has been a sufficient irregularity.

<sup>4</sup> A full account of both the law and the practice may be found in I. H. Dougherty's *Electoral System of the United States* (N. Y., 1906).

the counting of the votes. By usage two other steps have developed, so that there are now five steps in all. The first three are of great importance, while the last two, the voting by electors and the counting of the votes, have become mere formalities.

First step :  
nomination  
of  
candidates.

Stages in  
nomina-  
tion proce-  
dure :

(a) the  
calls for  
the party  
conven-  
tions.

(b) selec-  
tion of del-  
egates to  
the party  
conven-  
tions.

First of all there is the nomination of candidates, a matter on which there is not a word in the constitution, for it was not intended that there should be any formal nominations. The first formal step is taken with the calling of the national party conventions, but many months before this is done there are various aspirants at work stirring up public sentiment in their own behalf. Each of the great political parties maintains a general executive body known as its national committee, made up of delegates from each state. Each national committee decides when and where the convention of its own party shall be held. Usually the calls are issued in January of a presidential year, and the conventions meet in June.

Then in the following months the different political parties in each state select their own delegates to these conventions. Until recent years each convention gave every state twice as many delegates as it had senators and representatives combined. The Democratic national convention is still constituted on that basis. The Republican national convention is constituted according to new rules which were adopted in 1923. Under these rules a state gets four delegates at large, two delegates for each congressman at large, and three additional delegates if it went Republican at the last presidential election; each congressional district has one delegate, and an additional delegate if it cast at least 10,000 Republican votes at the last election. Delegates are also allotted to the territories and insular possessions.

It is also usual in the case of the major parties to select an equal number of alternates, to serve in case regular delegates are absent, and these alternates, or most of them, go to the place where the convention is being held. It will be observed, therefore, that the membership of a national party convention, if all the delegates and alternates are in attendance, runs over two thousand.<sup>1</sup> Not so many, as a matter of fact, go to any except the Republican and Democratic conventions. National con-

The District of Columbia, the territories (Alaska and Hawaii), and the insular possessions are also represented.

ventions of other parties, such as Prohibition and Farmer-Labor parties, rarely or never draw their full quota from all the forty-eight states.

How are these delegates and alternates chosen? Prior to 1910 they were chosen by party conventions held in the states and districts. But in that year, following the lead of Oregon, the states inaugurated the practice of choosing them by direct primaries. Nineteen states now follow this plan; the rest continue the older method. Until about fifteen years ago, moreover, it was not usual to "instruct" the delegates, that is, to exact a pledge that they would vote at the national convention for a specified candidate. On the primary ballot, in some of the states, however, the voter is given a chance to express his preference among the aspirants for the nomination, and the delegates are under a varying degree of obligation to respect the preferences of the majority. In some states it is binding upon them; in others it is not.<sup>1</sup>

Then comes the meeting of the convention. The Republican convention meets usually in one city, the Democratic convention in another, and the two do not meet at the same time. The procedure in each, however, is much the same. In the front portion of a great hall the delegates are seated with the alternates occupying the rear. A temporary chairman is chosen, usually without any opposition. A committee is appointed to examine the credentials of the delegates. When its report has been adopted the convention elects a permanent chairman and then proceeds to the adoption of the party platform. This platform has been framed in advance by a committee. Some "planks" in it may give rise to debate, but as a rule the platform is adopted without much change. Finally, on the third or fourth day, the great item on the calendar is reached, and nominations for the office of President are announced by the chairman to be in order. The roll of the states is called in alphabetical order, Alabama first and Wyoming last. The chairman of any state delegation, or any one deputed by him, may make a nomination. If a state has no candidate of its own, no "favorite son" as he is called, it may yield its place in the alphabet to some other state. Thus Alabama may yield to

(c) the  
conven-  
tions.

<sup>1</sup>For a full statement of the rules, see R. C. Brooks, *Political Parties and Electoral Problems* (N. Y., 1923), pp. 275-276.

Ohio and the Ohioan chairman will then nominate his own candidate. The nominations are usually supported by eulogistic speeches.

(d) balloting on nominations.

After the nominations have been made the voting begins. It is not by ballot but by a voice vote. At Democratic conventions the "unit rule" is frequently applied, that is, the vote of the entire delegation from each state is given intact whenever the state convention so directs and the state laws so permit, the majority in each delegation deciding how it shall be cast. At Republican conventions, on the other hand, the vote of a delegation may always be split if the delegates wish, although that does not usually happen. At any rate, the votes are given by the chairman of each state delegation. At Republican national conventions a candidate receives the nomination if he secures a clear majority of all the delegates; at Democratic national conventions he must obtain a two-thirds vote. In either case, when several candidates have been placed in nomination it is often necessary to take ballot after ballot before a choice is decided upon. The weaker candidates drop out; votes are shifted around on successive ballots, and the convention keeps at work, sometimes in the hottest days of June, until a decision is reached. James A. Garfield, in 1880, was nominated on the thirty-sixth ballot. Woodrow Wilson, at the Baltimore Convention of 1912, was not chosen until forty-six ballots had been taken. And, finally, at the Democratic national convention of 1924 it required one hundred and three ballots to reach a nomination. The presidential candidate having been chosen, the selection of the party nominee for the vice presidency is made in the same way, but usually with less trouble, and sometimes in a great hurry, for the big fight is over and the delegates are in a mood to get home.

Second step: the nomination of electors.

When the party conventions have finished their work, the next step is the nomination of electors in the several states. In each state the political parties put forth their slates of electors, nominated in whatever way the state laws prescribe. In some the electors are nominated at primaries, in others by state party conventions. These electors are usually prominent party workers, but must not be federal office-holders. Their names go on the ballot in parallel columns, and on the day set for the national election in November the voters in each state decide which



group of electors shall be chosen. When the voter marks his ballot for a certain group of electors, however, he is in reality indicating his preference for one or other of the candidates already named by the national conventions. The ballots do not bear the names of these presidential candidates, or, if they do, it is merely to guide the voters in voting for the desired group of electors. To all intents, nevertheless, the balloting is just as direct as though there were no intervening electors at all. The real election takes place on the "Tuesday after the first Monday in November." What occurs later, unless something untoward happens, is nothing but formality. The people pay no attention to it.

Third step :  
the election  
of electors.

Yet the constitution requires two further steps in the election of a President and Vice President, and these formalities must be gone through. In January following the election the electors chosen in each state come to the state capital and there go through the procedure of balloting for the candidates whom their party nominated at the national convention six months before. No constitutional provision or law prevents them from marking their ballots as they please, voting for someone other than the prescribed candidates, but they never do so unless, perhaps, a candidate chosen by a national party convention has died in the meantime. Then they vote as the national committee instructs them to vote.

Fourth  
step : elec-  
tion of the  
President  
by the  
electors.

The votes are attested, sealed up, and sent to Washington. In February the president of the Senate supervises the counting of the votes in the presence of both Houses of Congress. As a rule this is only an uninteresting ceremony, nothing more. But it may happen that the result is a tie, or that no candidate has received a clear majority of the total electoral vote. In either case the House of Representatives proceeds to choose a President from among the three candidates who have stood highest. In making this choice, however, the representatives do not vote as individuals; each state has one vote and the representatives from a state merely decide by majority action among themselves just how the vote of their state shall be cast. In case the electoral college fails to elect a Vice President by a clear majority, the Senate makes the choice from the two highest candidates, but the senators vote as individuals and not by states. On only two occasions, the last of them more than ninety years ago, has

Final step :  
transmis-  
sion and  
counting  
of the  
votes.

Congress been called upon to make the selection.<sup>1</sup> The result having been announced, the inauguration of the President and Vice President takes place upon the following fourth of March.

Some features connected with the foregoing procedure deserve an additional word of explanation. It will be observed, in the first place, that although the President of the United States is virtually elected by direct vote of the people he is not necessarily the choice of a popular majority.<sup>2</sup> A candidate may have more votes cast against him than for him (at the polls in November) and still be elected. Neither Rutherford B. Hayes in 1876, nor Benjamin Harrison in 1888, nor Woodrow Wilson in 1912 received a majority at the polls, yet all three of them went to the White House. This, of course, is a weakness in the system of choosing the nation's chief executive, and is generally recognized as such. It would be set right by a constitutional amendment were it not for the fact that the popular majority and the electoral majority are usually on the same side. The choice of a President by a minority of popular votes is the exception, not the rule.

The system of electing the President has been moulded by usage to fit the two-party system. It functions acceptably when there are two strong parties, one or the other of which carries all the states. It is not at all adapted to a three-party, or four-party system. With three strong political parties regularly in the field it would result in the choice of minority presidents. It would regularly throw the election into the hands of Congress for decision, for no one of the three political parties would secure a clear majority among the presidential electors. The growth of a strong third-party in the United States would probably lead, therefore, to a change in the process by which the President is chosen.

In Lord Bryce's admirable analysis of the spirit and workings of American government a chapter is devoted to the ques-

<sup>1</sup> The election of Thomas Jefferson in 1801 and of John Quincy Adams in 1825. Only once (1837) has the Vice President been chosen by the Senate.

<sup>2</sup> The party which wins even a very slender majority of the *popular* vote in any state takes all the *electoral* votes for that state. The losers get none. One political party may win in a number of states by small majorities, while the other carries the remaining states by an overwhelming popular vote. It is neither the number of popular votes, nor the number of states that counts; it is the number of electors.

The electoral method and the party system.

Lord Bryce on the presidency.

tion, "Why great men are not chosen Presidents." "Europeans often ask," wrote Bryce in 1884, "and Americans do not always explain, how it happens that this great office, the greatest in the world, unless we except the Papacy, to which anyone can rise by his own merits, is not more frequently filled by great and striking men." "Since the heroes of the Revolution died out with Jefferson and Adams and Madison," he continues, "no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the chair."<sup>1</sup>

These statements are not now so easy to defend as they were forty years ago. Many Americans regard Grover Cleveland and Woodrow Wilson as "great" presidents, even when measured with John Adams or James Madison; and there are few who would deny to Andrew Jackson and Theodore Roosevelt the possession of "striking qualities." Among the various Presidents of the United States, from Washington to Coolidge, there have been quite as many great and striking figures as one can discover among the prime ministers of England, during the same period. There have been little men in the White House at times, but Downing Street has also had its share of them.<sup>2</sup> The French Republic, during the past fifty years, has likewise had its quota of parvenu presidents. America is not alone in permitting mediocrity to gain, at times, the highest honor in the land.

Still, the query propounded by Lord Bryce is a suggestive one and deserves discussion. The United States has failed to utilize in the presidential office a long line of notable statesmen: Hamilton, Marshall, Gallatin, Webster, Clay, Calhoun, Seward, Sumner, Blaine, Hay, and others. On the other hand, it has bestowed its highest honor on men like Polk, Fillmore, Pierce, and Arthur, of whom no one now knows (or cares to know) much except that their names stand on the roll of the presidents. Certain it is, at any rate, that things have not turned out exactly as the Fathers of the Republic intended, for Hamilton in 1788 voiced the prediction that in view of the plan of indirect election provided by the constitution "the office of President

The nation has not always utilized its greatest men.

<sup>1</sup> *The American Commonwealth*, I, ch. vii.

<sup>2</sup> A further discussion of this point may be found in the author's *Personality in Politics* (N. Y., 1924), pp. 107-109.



will seldom fall to the lot of anyone who is not in an eminent degree endowed with the requisite qualifications. . . . It will not be too strong to say that there will be a constant probability of seeing the station filled by characters præminent for ability and virtue."

Factors which determine the choice of a President :  
1. Acceptability to a wide variety of interests.

In the United States several factors have contributed from time to time in placing at the head of the nation men who did not possess conspicuous qualifications for so great a responsibility. In the first place, the greatest asset of one who aspires to political office in any country having a free government is the general quality of being acceptable to a wide variety of political interests. A candidate is acceptable, if his temperament, his associations, and his reputation seem to fit the political needs of the moment. These needs are sometimes easy to meet; at other times very difficult. At the approach of one election campaign there may be many aspirants with the desired qualities; at other times a party may be hard pressed to find anyone who comes at all near the assumed requirements. It often happens, therefore, that a man who is by common agreement the strongest possible candidate in one year may be wholly out of the running a year or two later. The political stage shifts its back-ground quickly.

2. Experience, or the lack of it.

Long experience in political life is one of the things which ought to make one an acceptable candidate for high office; but in practice it usually does not. The man who spends a long term in the public service has either proved himself a trimmer or else by standing up courageously for his own opinions has made himself many enemies. If he has served several terms in Congress, he has necessarily supported some measures and opposed others. He has probably offended some elements of his own party. He is indeed fortunate if he has not antagonized some economic interests and made himself unpopular in various sections of the country. In other words, he has "made a record," and a public record, no matter how good it may be, usually presents opportunities for partisan or sectional attack. The Blaine-Cleveland campaign of 1884 afforded a good illustration of this factor. Mr. Blaine had given the country twenty years of aggressive service in Congress. Mr. Cleveland had all the advantage of being only three years in the public eye, and of never having held a national office at all. Mr. Blaine was beaten by



the enemies he had made. A considerable section of his own party, although fully recognizing his personal ability and his qualifications for the presidential post by reason of long familiarity with national problems, had been antagonized by his record in Congress. Of the eight Presidents since the first election of Cleveland, only Harrison, McKinley and Harding had served in either branch of Congress prior to assuming the presidential office. All the others had been in public life as governors of states or of insular possessions. They had not identified themselves too closely with matters of national legislation. Yet no man has reached the White House during the past forty years without having served an apprenticeship either in Congress, in the cabinet, or as governor of a state. Experience seems to prove, that the last-named route is the easiest one.<sup>1</sup>

It is politically desirable, again, that presidential candidates shall be taken from what are called the pivotal states. This results from the fact that the outcome of the election is not determined by the plurality of the total votes cast by the people but by a majority of the electors chosen. The successful candidate must carry enough states to control this majority, and he may do this (as has been shown) without getting a popular majority. When Grover Cleveland carried New York by less than twelve hundred, he captured that state's entire slate of presidential electors. A change of six hundred ballots would have given the electoral vote of the state, and with it the election, to his opponent. Cleveland had been nominated by the Democrats because it was believed that he, and he alone, could carry the Empire State for his party. If one will look over the presidential nominees of the two major parties during the past fifty years it will readily be seen that geography, quite as much as personality, has had to do with the selection.

Obviously anyone who aspires to the presidential nomination is at a disadvantage if he comes from a state which is likely to go against him, or if he comes from a small state. A presidential candidate should at least carry his own state and it ought to be a state worth carrying. The southern states are strongly Democratic; no Republican candidate has been picked

3. The influence of the "pivotal" states.

<sup>1</sup> Cleveland and Roosevelt had served as governors of New York, Wilson as governor of New Jersey, Coolidge as governor of Massachusetts, and Taft as governor-general of the Philippines.

from any of them since the party was organized. On the other hand it is almost inconceivable that the Democrats, under ordinary conditions, would select their standard-bearer from any of the Republican states of New England. And it is not the state alone but the region that sometimes dictates the choice. Good political strategy may seem to indicate that the presidential candidate, in a given campaign, should come from the East, or from the Middle West, or from some other great region of the country. And since the vice-presidential candidate should not be chosen from the same geographical area, the convention always picks him from somewhere else. Is it not significant that every President since the Civil War has come from Ohio or New York, with the exception of Woodrow Wilson, whose state is New York's next-door neighbor, and Calvin Coolidge who first went to the White House by succession on the death of an Ohio president?<sup>1</sup>

Types of  
candidates.

It has been customary to say that there are always three classes of aspirants for the presidential nomination, namely, "logical candidates," "favorite sons," and "dark horses." The logical candidates get into the running early, sometimes a year or two before the election. They draw support from a number of states and not infrequently manage to pledge a substantial fraction of the delegates before the convention meets. A President who is serving his first term is almost always regarded as the logical candidate of his party for a second term. It is only with great difficulty that anyone else can take the nomination away from him, and it has not been done in either party during the past forty years. The favorite sons are those whom individual states put forth and vote for on the early ballots. There is a hope that other states, particularly in the same region, may eventually lend a hand. Sometimes the favorite son is merely a "dummy." The local delegation pledges its support to him (knowing that he has absolutely no chance), in order to head off an attempt to capture the delegation for someone else. In other instances he may be a real candidate and stay in the balloting to the end. The dark horses, finally, are those who are not avowed candidates, who make no vigorous pre-convention campaign, but whose hope is that the convention may turn to them in case the leaders create a deadlock. A dark horse, to have any

<sup>1</sup> Harrison, though a resident of Indiana, was born in Ohio.

prospects, must be a man of the compromise type who has not openly antagonized any of the strong factions in the party.

Many other factors influence the choice of candidates. A man's religious belief, his business affiliations both past and present (especially his connection with great corporations, if he has had any), his acceptability to the financial interests, or to the labor organizations, his record for party loyalty, his readiness to play the game as the party leaders think it should be played, and, finally, the general impression of himself which he has stamped upon the public mind—all these things weigh more or less in the selection. Yet they are not directly related to the possession of great intellectual capacity or marked administrative skill. The ablest statesman in the land may be inferior, in point of political availability, to some dark horse from a pivotal state. Great men do not necessarily make strong candidates, and it is the business of the national conventions to select candidates, not Presidents.

4. Personal factors.

The policy of fixing rigidly the date at which a presidential election shall take place has also had its effect. In England a general election must ordinarily occur at least once in every five years. But within this limit an administration can "go to the country" whenever it pleases. It can avoid a time when public opinion seems to be running adversely and can choose a moment when some striking administrative success or some popular stroke may operate heavily in its favor. Students of comparative government did not fail to notice that Lloyd George, the British prime minister, called for an election immediately after the Armistice of 1918, before the first flush of enthusiasm had passed. Of course he carried the country. In America the party leaders cannot do that sort of thing. They cannot "spring an election on the country." They must take the times as they are. If the presidential election comes along during a year of business depression and slender harvests, the party in power is likely to suffer, not necessarily through any fault of its own. Candidates are chosen to suit the times; there are fair-weather candidates and there are those to whom the parties turn when the skies are darkening.

5. The time of the election.

Yet the presidency, when all is said, has maintained a pretty high level of ability and statesmanship, save for a lapse at one period. It has been "one thing at one time, another at another,

Ups and downs of the presidency.



varying with the man who occupied the office and with the circumstances that surrounded him."<sup>1</sup> During the first thirty-five years of its existence the standard was up to the very highest expectations. No wonder men felt that the method of election was a great success. Washington, Adams, Jefferson and Madison represented the best the country could give. All the Presidents prior to Andrew Jackson, indeed, were just about what the framers of the constitution expected the incumbents of the office to be. Jackson, first elected in 1828, was not a man of great intellectual qualities; but he was surely an aggressive and virile figure, the personification of a new era in the nation's politics. His successor, Van Buren, has been accurately characterized as a "first-rate second-class man," which is rather more than can be said of any among the seven presidents who intervened between him and Lincoln.<sup>2</sup> During this quarter of a century, the mediocrities had their day, varied on two occasions by the election of soldiers who had made reputations in the War of 1812 or in the Mexican war. The outstanding figures of American statesmanship during this period, Webster and Clay among them, were either passed over by conventions or defeated at the polls. In the late fifties, accordingly, it might well have been said that the presidency was entirely failing to justify the high hopes placed upon it by the creators of the constitution.

Then came the election of Lincoln and the Civil War. In Lincoln's day the prestige and powers of the presidency rose enormously. And after a lurid interval marked by unseemly quarrels between Congress and Andrew Johnson (who became President on Lincoln's death) General Grant was chosen as the nation's chief executive on his military reputation alone. As President, the victor of Shiloh was not an unalloyed success, but he was re-elected, outlived the end of his second term, and would have accepted a third nomination had it been offered to him. It is as yet too early to determine how posterity will ultimately regard the line of eleven presidents who have held office since Grant's retirement in 1877. Three of them will undoubtedly be reckoned worthy of a place in Bryce's category of great and striking men. Cleveland was a great President, by

<sup>1</sup> Woodrow Wilson, *Constitutional Government in the United States* (N. Y., 1911), p. 57.

<sup>2</sup> T. F. Moran, *American Presidents* (N. Y., 1917).



whatever standard judged; Roosevelt was both great and striking; Wilson's place in history is assured, not only by reason of his rare intellectual capacity but because of the epoch-marking events from which his name can never be dissociated. As for the others, their claims upon posterity are as yet controversial—and a textbook is no place for a controversy.

The history of the presidency, therefore, falls into five periods: The five periods.  
 The first, from Washington to John Quincy Adams inclusive (1789-1829), was an era when the government was "getting a footing both at home and abroad, struggling for its place among the nations and its full credit among its own people; when English precedents and traditions were strongest; and when the men chosen for the office were men bred to leadership in a way that attracted to them the attention and confidence of the whole country." The second period, from Jackson to Buchanan (1829-1861), was a day of cruder and more intense politics, with the influence of the frontier making itself dominant while sectionalism worked havoc with the solidarity of political parties. It was the day of little men in positions of leadership. The third era, from Lincoln to Arthur (1861-1885), was dominated by the war and its legacies, including the question of greenbacks, to the exclusion of most other things. Fourth, in the epoch between the first election of Cleveland in 1884 and the opening of the European War in 1914 questions of domestic policy were once more uppermost in the minds of the people. And, finally, there is the era of to-day which the world war inaugurated and to which no end is yet in sight. During these last three periods the presidency has had its ups and its downs; but it has neither gone up to the pinnacle that it reached in the days of the Virginia dynasty nor descended to the depths that it plumbed during the "roaring forties and the frivolous fifties" of the nineteenth century.

As for the future, there is nothing to indicate the likelihood of any change for better or for worse. Fifteen years ago, when the adoption of presidential primaries assumed the proportions of a stampede, it was anticipated that the new method would quickly put an end to the compromises and dickers which had so often resulted in sending second-rate men to the executive mansion. This expectation was not warranted, and it has not been fulfilled. The plan of asking the voters to express their prefer- What of the future?

ences at the polls, and of pledging the delegates in accordance with such preferences, runs foul of the realities. It has not, and will not, put an end to shifts and bargains.

For delegates cannot be sent to a national convention with definite instructions covering all eventualities. Situations will arise in which a delegation must be free to act. The candidate to whom they were pledged may withdraw, or his chances of getting the nomination may disappear. Then the delegation must be free to use its own discretion. And in the exercise of this discretion it will do whatever sound political strategy seems to demand. Under traditional American conditions the choice of a presidential candidate is not a matter of selecting one from two, but one from a whole field. Such a task calls for deliberation and discussion, not for the mere marking of a cross on a ballot.

Presiden-  
tial  
primaries  
do not  
solve our  
problem.

Anyone who studies the project of nominating the presidential candidates by nation-wide direct primaries will find that it bristles with practical difficulties. Perhaps these difficulties are not insurmountable, but they come close to deserving that characterization. And even assuming that the practical difficulties could be overcome there is no assurance that the use of the presidential primary on a national scale would result in the nomination of better candidates. State conventions, as nominating bodies, have been supplanted by state primaries in many parts of the Union. The results have been far below the expectations. Campaigns for the nomination have become far more expensive to candidates and their political friends; the voters are called out to the polls on an additional occasion; the deliberations and compromises which marked a convention are no longer possible; and on the whole there has been no appreciable improvement in standard of nominations. Such experience as we have had with presidential primaries indicates that they have all these faults—on a far larger scale. If any improvement in the great and striking qualities of American presidents is to be sought, therefore, it will have to be by some more comprehensive plan than the selection of candidates or the pledging of delegates at presidential primaries.<sup>1</sup>

<sup>1</sup> For a discussion of this subject see Robert C. Brooks, *Political Parties and Electoral Problems* (N. Y., 1923), pp. 277-281, and the references given in the footnotes.

The remuneration of the President is fixed by Congress, but it may not be either increased or diminished during the term for which he was elected. At present it is \$75,000 per annum. In addition, various appropriations for secretaries, clerks, traveling expenses, the care and maintenance of the White House, and so on are annually made, amounting to more than three hundred thousand dollars. Even this, however, is not a large amount when compared with the total cost of maintaining the chief executive position in European countries.

Salary and allowances.

The framers of the constitution made provision for a Vice President, although one of them remarked in the course of the debates that such an official was "not wanted" and that the position was merely being established as a consolation prize inasmuch as it was to be bestowed upon the candidate getting the second-highest vote in the electoral college. If Congress had been given power to choose the President, as was the original plan of the Fathers, there would have been no need for a Vice President. In the event of a vacancy the national legislature would choose a new President at once. That is what happens in the French Republic where the cabinet takes over the executive functions until a new President is chosen by the National Assembly. France has no Vice President. But when the election of the American President by an electoral college was decided upon it became apparent that there would be objections to leaving the presidential office vacant until electors could be chosen and could act.

The vice presidency.

So the vice presidency was established to meet unexpected emergencies with the necessary promptness. "In case of the removal of the President from office," recites the constitution, "or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve upon the Vice President."<sup>1</sup> On six occasions since 1789 the death of a President has devolved his duties upon the Vice President in accordance with this provision of the constitution. No President has resigned or been removed by impeachment, and in no case has the devolution come because of inability to discharge the presidential functions, although President Garfield during his last illness was for more than two months in 1881 physically unable to perform any important official act and President Wil-

Succession to the presidency.

<sup>1</sup> Article ii, Section 1.

son was physically incapacitated for a considerable length of time during the later part of his second term.<sup>1</sup> In case the Vice President is for any reason not available to succeed the President, the constitution gives Congress the right to determine the order of succession, and Congress has so provided by the Presidential Succession Act of 1886, naming the various cabinet officers according to the seniority of their posts: the secretary of state, the secretary of the treasury, and so on. But no one of these officials may in any event succeed to the presidency if he be a naturalized citizen or in any other way ineligible. When a vacancy occurs in the office of Vice President, it is not filled till the next election and during the interval the secretary of state stands as the heir-apparent. But thus far, in a hundred and thirty-seven years, the succession has never passed beyond the Vice President.

The vice  
presidency.

A few words, but only a few, should be added with reference to the position and duties of the vice-presidency. The framers of the constitution intended the office to be a dignified and important one, its incumbent to be a man second only to the President in the favor of the electors and in line for the higher post at the next election. During the first few decades this view of the office persisted; but with the practice of nominating the candidates at national conventions it was gradually lost to view. Thereupon the vice-presidential nomination came to be used as a means of strengthening the party ticket. It is still so used. It goes, as a rule, to balance the ticket geographically or to someone who can placate a disgruntled or disappointed faction of the party, or bring some doubtful state into line, or secure large contributions to the party's campaign funds. The personal merit and capacity of the candidate has not counted overwhelmingly during the past hundred years, nevertheless some men of very marked ability have found themselves catapulted into the office. The Vice President presides in the Senate, but has no vote except in case of a tie. During the Harding administration (1921-1923) the Vice President was regularly invited to attend meetings of the cabinet and did so.

No one is eligible to the presidency or the vice-presidency,

<sup>1</sup> Absence from the United States, even for months at a time, does not constitute "inability to discharge the duties" of the presidency—as President Wilson demonstrated during his absence in France.



either by election or by succession, unless he be a natural born citizen, thirty-five years of age or more, and unless he shall have been a resident of the United States for at least fourteen years. A special exemption was made in the constitution for those who were citizens at the time of its adoption, this being done as a matter of courtesy to Alexander Hamilton, James Wilson, and others who, although not born in the territory which formed the Union, had taken a considerable share in establishing the new government.<sup>1</sup>

Constitutional qualifications of the President and the Vice President.

<sup>1</sup>In addition to Stanwood's *History of the Presidency* (already cited) mention may be made of J. B. Bishop's *Presidential Nominations and Elections* (N. Y., 1916) and J. H. Dougherty's *Electoral System of the United States* (N. Y., 1906), all of which are useful for a further study of the subjects dealt with in this chapter.

## CHAPTER IX

### PRESIDENTIAL POWERS AND FUNCTIONS

The presidency is a great office. If a man is fit to be President, he will speedily so impress himself on the office that the policies pursued will be his anyhow.—*Theodore Roosevelt*.

Parliamentary and presidential executives.

Free government has developed two different types of executive power, which are commonly known as *parliamentary* and *presidential*. A parliamentary or "responsible" executive is one which derives its power from the legislature and is responsible to that body for all its official acts. It holds office so long as it commands the confidence of the legislative body, and no longer. Under this arrangement the legislature is the supreme organ of government, for it can change the executive at any time. England is the classic example of a country with a parliamentary executive, the prime minister being directly responsible to the House of Commons. A presidential or independent executive, on the other hand, does not derive its powers from the legislature but from the people directly; it forms a coördinate branch of the government and is beyond the power of the legislature to control. This is the type of executive that we have in the United States. The President exercises authority in his own right, not as the agent of Congress. The governors of the several states are independent executives in the same sense.

Which type is the better?

Much has been written about the relative merits of these two types, the parliamentary and the presidential executive. Both have their strong and weak features. The English system has the merit of ensuring effective leadership in the lawmaking body; but it provides no safeguard against an enormous concentration of power in a single hand. In some respects the English cabinet has become the real lawmaking body of the kingdom, and parliament merely ratifies its decisions. The American plan, in keeping with the principle of checks and balances, has the merit of supplying an ample safeguard against the development of an

all-powerful executive; but it leaves Congress without any official leadership.

It is worth mention that nearly all the great governments of the world have followed the English, not the American plan. France, Italy, Spain, Holland, Belgium and Japan have had a responsible executive for many years. After the close of the world war new republican constitutions were framed and adopted in Germany, Austria, Poland, Czechoslovakia, Hungary, Ireland and several other countries. One and all they fashioned their executive on the English model, but with some variations. Not one, not even Ireland, has copied the executive organization of the United States. It is clear, therefore, that whatever we may ourselves think of checks and balances as a dogma of practical politics, the rest of the world does not think much of it. Only the countries of Central and South America have accorded it the flattery of imitation.

The drift  
in various  
countries.

The President of the United States derives his principal powers directly from the constitution which gives him, in express terms, the right to veto acts of Congress, to appoint officials of government and to make treaties (both with the advice and consent of the Senate), to pardon offenders, to be commander-in-chief of the army and navy, and to "take care that the laws be faithfully executed." These are constitutional powers which Congress can neither weaken nor take away. They make the President an independent executive, wholly different from any European chief of state whose authority is dependent upon the will of his country's parliament.

Sources  
of the  
President's  
authority :

1. The  
constitu-  
tion.

In addition to the powers bestowed upon him by the express terms of the constitution, the President of the United States has acquired a good deal of authority by statute and by judicial decision as well. Congress, from time to time, has delegated to the President authority which would not otherwise belong to him. In 1917, for example, it passed an act permitting him to determine when, if at all, the national government should take over and operate the railroads. In 1921 it enacted a tariff law and delegated to the President power to change certain rates of customs duty if he saw fit. Time and again, moreover, the courts have decided that certain powers belong to the President although they have not been expressly granted to him by the constitution or the laws. The constitution, for example, gives

2. Laws  
and  
judicial  
decisions.

## 3. Usage.

the President the right to pardon offenders but does not say whether he may pardon a man before he is convicted. The Supreme Court has held that he possesses such power.<sup>1</sup> But the President has no inherent authority, no "prerogatives" such as are possessed by the crown in England. All his powers are derived from the constitution, the laws, the judicial decisions, or, in a few cases, from usage. President Roosevelt once asserted the novel doctrine that it was his right "to do anything that the needs of the nation demand unless such action is forbidden by the constitution or the laws." This was a characteristically Rooseveltian point of view, but it is absolutely at variance with the whole system of American governmental authority. The President's powers are those which have been given to him, not those which he chooses to assume.<sup>2</sup>

Now the powers and functions which have been given to the President may be conveniently grouped under the five main heads. For want of better words we may call them (a) strictly executive, (b) diplomatic, (c) legislative, (d) military, and (e) political. The first four are devolved upon him by the constitution and the laws; the last is an outgrowth of the party system.

Classifica-  
tion of the  
President's  
powers.

1. Strictly  
executive  
powers.

The President is the nation's chief executive. The constitution expressly declares that the executive power shall be vested in him. It enjoins him to "take care that all the laws be faithfully executed." While the government of the United States is designed to be "a government of laws, not of men," laws are not self-executing. They must have officials to apply them and courts to enforce them. As chief executive, accordingly, the President is authorized to appoint both the administrative officials of the federal government and the judges of the federal courts. This places in his hands one of the most important executive powers that he exercises. It gives him more political influence than he derives from any other function intrusted to him.

<sup>1</sup> *Ex parte Garland*, 4 Wallace, 333 (1866).

<sup>2</sup> For the views of recent Presidents concerning what the functions of the presidential office are, or ought to be, the reader may be referred to W. H. Taft's *Our Chief Magistrate and His Powers* (N. Y., 1916); Grover Cleveland's *Presidential Problems* (N. Y., 1904); Theodore Roosevelt's *Autobiography* (N. Y., 1913), especially ch. x.; Benjamin Harrison's *This Country of Ours* (N. Y., 1898), especially chs. iv-xix; and Woodrow Wilson's *Constitutional Government in the United States* (N. Y., 1911), ch. iii.



In the entire national service of the United States there are nearly 600,000 officials of all grades. Of these only 533 are elected, to wit, the President, the Vice-President, 96 Senators, and 435 Representatives. The rest are appointed, either by the President or by his subordinates. No chief executive, in any other country, has such a range of appointing authority.

(a) appointments

The constitution divides all appointive offices into two classes, namely, those higher posts which must be filled by the President with the advice and consent of the Senate, and those "inferior" offices which may be filled, if Congress should so provide, by the President alone, or by the heads of departments, or by the courts. In the category of higher offices, appointed by the President with the concurrence of the Senate, are the members of the cabinet, all ambassadors, ministers, and consuls, all judges and court officials, members of the various federal commissions such as the Interstate Commerce Commission, the Federal Trade Commission, the Railway Labor Board, the Tariff Commission, and the Federal Reserve Board, together with postmasters, collectors of customs, and officials who have to do with the collection of revenues. Promotions in the army and navy, above a certain rank, are also subject to senatorial confirmation. In all such cases the President sends his nomination to the Senate, and this body may confirm or reject it. If the Senate be not in session when the nomination is made, the nominee takes office at once and holds what is termed a "recess appointment" until the Senate has had the opportunity to take action.

How appointments are made.

The Senate has an undoubted right to refuse assent to any nomination which the President may send. But almost always it allows the President to name the members of his own cabinet, confirming these nominations as a matter of course. Only once in more than fifty years has it refused confirmation to anyone selected by the President for cabinet rank.<sup>1</sup> And rightly so, for when he selects members of his cabinet, he should be given a free hand. In all other cases, however, the Senate's power is one to be reckoned with. It has refused its assent to appointments in a great many cases. As a rule it does not withhold its consent except for some good reason, but much depends upon whether the

Limitations upon the appointing power: senatorial confirmation.

<sup>1</sup>The last instance was that of Charles B. Warren, nominated by President Coolidge as attorney-general in 1925. There are no previous examples back to 1868.

President and a majority of the senators are of the same political faith and are working in harmony. To confirm a nomination sent to it by the President a bare majority of the senators present is required. It does not take a two-thirds vote as in the case of ratifying treaties.

The rule of senatorial courtesy.

While the words "advice and consent" might seem to indicate that the Senate was to have advisory as well as confirming functions, it was not intended that the constitution should give the senators any actual initiative in the making of appointments. Nor has the Senate ever laid claim to such right. In due course there developed, however, the unwritten rule known as the "courtesy of the Senate." Stated briefly, this is the practice of refusing to confirm the nomination of any local officer, such as a postmaster or collector of internal revenue, unless the nominee is satisfactory to the senator or senators from the state concerned, provided of course that these senators are of the same political party as the President himself. Or, to put it more concretely, a Republican President must not nominate anyone as postmaster at Philadelphia without first consulting the Republican senators from that state. If he does so, the other senators, out of courtesy to their Pennsylvania colleagues, are under obligation to refuse confirmation. Senatorial courtesy has had its ups and downs; it has been strong enough at times to tie the President's hands almost completely; on the other hand, some Presidents have successfully defied it. President Garfield, for example, locked horns with the two senators from New York State on this issue in 1881 and won a signal victory. President Roosevelt, to use his own words, "normally accepted each senator's recommendations for offices of a routine kind, such as post-offices and the like," but "insisted on personally choosing the men for the more important positions." Still, no matter what the President's personal inclinations may be, he is sure to find that he can avoid trouble and can get support for his executive policies by antagonizing the senators as little as possible. The President has only half the appointing power; the Senate has the rest. And so long as this is the case there is little to be gained by creating deadlocks.<sup>1</sup>

In the case of the "inferior" offices, such as postmasters in small communities, or clerkships, or the host of subordinate

<sup>1</sup> See also *below*, p. 202.

Minor offices.

positions in the various departments, the power of appointment is vested by law in the President alone, or in the heads of departments, or in the courts, but more particularly in the President alone. The last category includes well above a half million offices. Some of them are still treated as "patronage" and are filled at the suggestion of senators or representatives from the districts concerned; but by far the greater portion of them are now dealt with in accordance with the civil service regulations.

The beginnings of the civil service system go back to 1883 when Congress, after a hard fight, was prevailed upon to enact the first civil service law. For nearly half a century, since the accession of Andrew Jackson, the "spoils system" had reigned supreme and unashamed. Appointive positions in the government service were frankly treated as patronage, as spoils of victory, to be distributed among the valiant warriors of the winning party after each presidential election. When a new President came in, everybody holding an appointive office went out. Personal merit and efficiency counted for very little, or indeed for nothing at all. The question was not "What can he do for the people?" but "What has he done for the party?" Under the spoils system the whole public service became demoralized; important positions were everywhere bestowed upon hungry office-seekers who possessed no personal fitness for the work which they were supposed to do. A large part of the President's time was taken up by senators and congressmen who came to the White House in endless succession, one on the heels of another, seeking jobs for the payroll-patriots of their own states and districts. Then, in turn, the senators and congressmen gave much of their energy to the task of pacifying and satisfying their avaricious supporters. It was political beggary on a huge scale and dulled the self-respect of everyone concerned in it.

But although the miserable ramifications of this system were understood and regretted by intelligent Americans, the vicious circle of patronage was hard to break. Reformers protested, but for a long time their voices were those of men crying in the wilderness. Public opinion eventually began to swing around, however, and in 1881 there came a tragic happening which roused the country to the need for action. How often it has taken a shock to awaken the American conscience! In the

The civil  
service  
system:  
Its  
genesis.

The  
Garfield  
tragedy.

The  
Pendleton  
Act.

summer of 1881 the newly-inaugurated President, James A. Garfield, was assassinated by an office-seeker whose demands had been refused. Things had come to such a pass that a President could only deny patronage at the risk of his life. The country rebelled at the idea; both political parties hastened to promise the abolition of the spoils system, and early in 1883 the Pendleton Act, which was the first American civil service reform law, went on the statute book.

Present  
arrange-  
ments.

As subsequently amended, and greatly widened, the civil service laws now provide for a federal civil service commission of three members appointed by the President.<sup>1</sup> This commission is charged with the duty of examining all candidates for positions in what is known as "the classified service." This classified service now includes about ninety-five per cent of all the employees of the national government. The civil service commission receives applications for all positions in the classified service; it holds examinations, and when a vacancy occurs it transmits to the appointing authority the names which stand at the head of the list. It examines more than 300,000 applicants every year. The examinations are not of the academic type but are practical in character and are related to the nature of the work which the appointee is expected to do. This method of selection on a merit basis has been of great advantage to the public service. It has deflected the importunities of office-seekers and given to the President time for other things than the distribution of loaves and fishes. The civil service system has not given complete satisfaction in all quarters but it has greatly improved the standards of work in all federal offices.<sup>2</sup>

(b) re-  
movals.

The constitution does not say how appointive officials are to be removed. Its framers apparently took for granted that they would stay in office until they died or resigned. But the question of dismissing officials for incompetence soon arose and at the first session of Congress in 1789 the question was debated. Some congressmen felt that the approval of the Senate ought to be required, but in the end the matter was settled by a tacit agreement that the President should have power to remove with-

<sup>1</sup> Confirmation by the Senate is required. It is also required that not more than two of the three commissioners shall be from the same political party.

<sup>2</sup> For a discussion of the system in its practical workings, see *below*, pp. 485-486. See also L. Mayers, *The Federal Service* (1921).



out securing the consent of the Senate. On one or two subsequent occasions Congress undertook to restrict the President's freedom in making removals, but without much success.<sup>1</sup> The President's power of removal does not rest, therefore, upon the constitution, the laws, or judicial decision, but upon usage alone.

At any rate the President can remove appointive officials at his discretion. He does not need to give any reason, much less a good reason. But his power of removal does not extend to all appointive officials of whatever rank or status. Two classes of office-holders are exempt from dismissal without assigned cause, first, the judges of the federal courts, who can be removed by impeachment only; and second, those who secure appointment under civil service rules. The latter may not be removed "except for such causes as will promote the efficiency of the service." This limitation is not necessarily a serious obstacle to a President who desires to make removals on political grounds, but in practice its spirit has been well respected.

Limitations upon the power of removal

Taken in all its bearings, the appointing power of the President is of great extent. No head of any other nation has anything approaching it. Many have equal or greater appointing powers in theory; but the personal discretion of the American President has a far greater range than that of any prime minister, chancellor, or monarch. Of all the presidential powers, moreover, the appointing power is the most disagreeable in its exercise, the one that makes most demand upon the President's time, and the one that may be most easily used for wrongful purposes.

Importance of the appointing power.

The civil service laws have done much to mitigate the worst features of the spoils system, but even yet patronage is far from being wholly abolished. Many hundreds of highly-paid offices

<sup>1</sup> Notably in 1867 when Congress passed the "Tenure of Office Act" with the plain purpose of preventing President Andrew Johnson from removing various officers. It provided that any person holding a civil office to which he had been appointed with the confirmation of the Senate should hold such office until a successor was in like manner appointed; that during a recess of the Senate the President might suspend but not remove, the Senate having authority to concur or not to concur when it resumed its session. The act was vetoed by the President and passed over his veto. President Johnson disregarded it as unconstitutional, and this action was one of the grounds upon which he was impeached. The act was partly repealed in 1869, and practically altogether repealed in 1887. It is now generally conceded to have been an unconstitutional enactment, although it was never passed upon by the Supreme Court.

are still within the gift of the President. For these he is pressed from all sides by office-seekers and their friends; he is held responsible for appointments which of necessity he must make without accurate personal knowledge, and there is ever present the temptation to use the appointing power in ways that will insure his own renomination or promote the interests of his own party. On the whole, however, this temptation has been well resisted. An unscrupulous President, if he chose to misuse without stint his powers of appointment and removal, could in four years build up a personal and political machine of almost irresistible strength; for with the enormous growth in the functions of national government the appointing power has extended over a far wider range than could ever have been foreseen when the foundations of the Republic were laid.

(c) the  
power of  
pardon.

Another power, sometimes spoken of as quasi-judicial, but really executive both in its origin and in its nature, is the power to "grant reprieves and pardons." The President may pardon any offence against the federal laws, but he has, of course, no authority to grant pardons for offences against the laws of any state. The pardon may be either partial or complete. A complete pardon blots out the offence as though it had never been committed. One limitation is imposed upon the President by the constitution, however, in that he can grant no pardon to anyone convicted by the process of impeachment. This embodies a lesson which the framers of the constitution drew from the Stuart period of English history when the monarch, on more than one occasion, relieved his advisers in this way from penalties imposed by parliament. With the power to pardon is linked the power to reprieve, which is the right to stay the enforcement of the penalty without (as in the case of a complete pardon) blotting out the offence. A general pardon, granted to a large number of offenders, is called an amnesty. The pardoning power, it need hardly be said, is not exercised by the President at his own caprice, as is the fashion in despotisms, but on information and advice supplied by the attorney-general.

2. Powers  
relating to  
diplomacy.

Another group of executive powers are those which relate to diplomacy, treaties, and the general handling of foreign affairs. The President is the official spokesman of the United States in all formal intercourse with foreign countries. He appoints (with the confirmation of the Senate) all American ambassadors and

ministers to foreign capitals, and their instructions in all important matters are given by him through the secretary of state. Ambassadors who come to Washington from foreign lands are accredited to the President. And if a foreign ambassador or minister becomes *persona non grata*, it is the President's function to dismiss him or ask for his recall. In all important negotiations he may assume personal supervision of the communications sent to foreign governments, even to the extent of preparing them himself. The initiative in foreign affairs, which the President possesses without any restriction, is a very great power and at times amounts to absolute control.

The President determines, for example, whether the United States will "recognize" a newly-established government and inaugurate diplomatic relations with it.<sup>1</sup> This giving or withholding of recognition may be the vital factor in determining whether the new government can maintain itself. By his quick recognition of Panama in 1903 President Roosevelt virtually assured the independence of this new republic. And the collapse of the Huerta government in Mexico, just before the outbreak of the world war, was directly attributable to its failure to obtain recognition from the United States. Congress might pass a joint resolution according recognition to a foreign government; it might even pass such a resolution over the President's veto; but there is no way in which Congress can compel the President to make the resolution effective by appointing an ambassador. So the power of recognition, as a practical matter, is wholly in the President's hands.

The President's control of foreign policy is, therefore, very extensive. But there are limitations upon it. He can authorize the making of a treaty with any foreign state, but no treaty can go into effect until it has been ratified by a two-thirds vote of the Senate. In other words, he has the first word, but not the last. He can break off diplomatic intercourse with any other nation, and may take various other steps which are tantamount to a declaration of war; but a formal declaration of war can be made only by Congress. In practice the President does not usually venture to direct the foreign relations of the United States without relying on the advice of others. He depends for

Limitations upon these powers.

<sup>1</sup> Julius Goebel, *The Recognition Policy of the United States* (N. Y., 1915).

guidance to some extent upon his cabinet, to some extent upon the leaders of his own party in both Houses of Congress, and he is always subject to the pressure of public opinion. In speaking of this matter one must always afford considerable scope for the interplay of men and circumstances. Some Presidents have made the handling of foreign affairs their special hobby, leaving but little to the discretion of the state department and rarely deigning to consult the congressional leaders; others have shown far less inclination to deal personally with diplomatic negotiations. When matters of great importance are in controversy, however, the nation expects the President to take the reins of foreign policy into his own hands. But under no circumstances may the President finally commit the nation to an alliance or to any other obligation based upon a treaty. This power he must share with the Senate.<sup>1</sup> The framers of the constitution realized the dangers which might arise from clandestine alliances and secret diplomacy. They were determined that these things should not set their curse upon the New World. And on the whole they took a wise precaution. At times the Senate, by withholding its assent, has prevented the conclusion of arbitration treaties and other agreements which would probably have benefited the nation, but on the other hand its insistence upon a full and frank discussion of every proposed international compact has saved the United States from being drawn into that maelstrom of duplicity and intrigue which has so long and so steadily cursed the diplomacy of Europe.

The foreign policy of the nation has been largely moulded by its Presidents. Washington started the traditional policy of aloofness; Monroe promulgated the doctrine which has since borne his name; later presidents have given direction to the national policy as regards the "open door," the Panama Canal, Mexico, and the Pacific. This is not to say, however, that Congress has no share in determining the direction of American foreign policy. No President can go very far in this field of executive activity without coming to Congress for money or for enabling legislation of some sort. Then Congress, if it chooses, may control the situation. We sometimes hear it said

<sup>1</sup> On this general subject see Edward S. Corwin, *The President's Control of Foreign Relations* (Princeton, 1917); J. M. Mathews, *The Conduct of American Foreign Relations* (N. Y., 1922), and Quincy Wright, *The Control of American Foreign Relations* (N. Y., 1922).



that President McKinley was responsible for the acquisition of the Philippine Islands. That is true; but it is equally true that he had to obtain from Congress the twenty million dollars stipulated in the treaty, and when Congress voted this money it assumed joint responsibility for the acquisition of the islands. In defiance of Congress no President can ever proceed very far.

Next among the powers of the President are those which have to do with lawmaking. One might judge from the reverence with which the statesmen of 1787 regarded Montesquieu's doctrine of checks and balances that the President would have been given no share in national legislation. But he was, in fact, endowed with some powers in relation to the making of the national laws, and by usage these powers have been greatly expanded. By the terms of the constitution he is intrusted with two definite functions in relation to lawmaking, one positive and the other negative. He has the right to recommend the passage of bills by Congress and he has the right to *veto* any bill after it is passed.

Unlike the chief executive in most European states, the President does not call the national legislature together except in special session. The time for the beginning of regular sessions is fixed by law. Nor does he adjourn Congress unless the two Houses fail to agree between themselves as to the time of adjournment. The power of dissolution, so important in England, does not exist in the United States. Congress finishes out its two-year term, no more, no less. It cannot be dissolved by executive action. In this respect the Congress of the United States differs from the British House of Commons, the French Chamber of Deputies, and the German Reichstag.

The constitution, again, requires the President to "give to the Congress from time to time information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." This is the basis of the President's right to send messages to Congress, a right which has been freely used from the outset. Washington and Adams delivered their recommendations by addressing Congress in person; but Jefferson began the practice of sending written messages to be read in both Houses by the clerks, and this plan was consistently followed until 1913, when President Wilson reverted to the earlier method. His immediate successors, Harding and

3. Powers in relation to legislation.

Restrictions upon the power to call, adjourn, or dissolve Congress.

The President's messages.

Coolidge, have continued it. A message makes a more distinct impression on Congress when it is delivered by the President in person, especially if he be a forceful speaker. But whether read to Congress or merely sent in writing, the messages may come at any time and may deal with any subject. Invariably there is a long message at the beginning of each congressional session which deals with a great variety of questions; then there are special messages dealing with particular subjects whenever the President may see fit.

How far  
do they  
produce  
results?

But while the President may recommend many things, some of them with great earnestness, it does not follow that Congress will act upon these recommendations. A President's annual message is not, like the speech from the throne in England, an outline of what will surely come to pass before the session ends. What the speech from the throne recommends is almost certain to be followed by parliament because the men who really frame these recommendations, namely, the prime minister and his colleagues, have a majority in parliament ready to do their bidding. The President, on the contrary, may have no such congressional majority in sympathy with him. The other political party may control a majority in either or both Houses of Congress. That has frequently been the case. And even if his own party does control both Houses, the President has no assurance that the senators and representatives will do what he advises. The result is that projects of legislation, however urgently recommended to Congress by the President, often fail to receive acceptance.

Their  
influence  
on legis-  
lation.

On the other hand, presidential recommendations always carry weight, and there are many occasions upon which they move Congress to action. When the President's own political party is in control of Congress; when he has taken counsel with the party leaders and obtained their support—in such cases he can make recommendations with reasonable ground for expecting that they will be followed. His message, under such circumstances, is not merely an appeal to Congress, but to his political party and indeed to the whole country. There are times when the President uses his message as a means of stirring up public opinion, or making some feature of American policy clear to the whole world, or interpreting the mind of the country as he understands it. For be it remembered that the President is chosen

by the entire country, represents the whole of it, and is the logical one to make its wishes known. When the President judges the public mind aright he can bring strong pressure to bear upon Congress through the leadership which his messages provide. Roosevelt did this on several occasions; so did Wilson. The methods of these two Presidents differed greatly, but the end which they sought and gained were the same.

The President can go beyond the mere sending of messages. He may actually have bills prepared in accordance with his own ideas and may have these bills introduced into Congress by some friendly senator or representative. He may invite influential members of Congress to his office, reason with them, and try to obtain their support for his measures. He may even throw out a hint that those who do not stand by the administration must not expect presidential favors and patronage. In many other ways he may exert a powerful influence on behalf of measures in which he is interested.

To say that the President is an executive officer, and hence has nothing to do with lawmaking, is to talk philosophy, not facts. The President can be, and sometimes is, a more important factor in lawmaking than any congressman, or any dozen congressmen. It all depends upon two things, the political complexion of Congress and the personality of the President. Here, more than anywhere else, the function is the measure of the man. Andrew Johnson, opposed and disliked by a majority in both Houses, found his advice rebuffed and all manner of unfriendly legislation sent to him for his signature. Woodrow Wilson, on the other hand, gave us an astonishing illustration of the way in which a President, when favorably placed in relation to Congress, and possessed of the requisite personal qualities, can virtually write the laws on the statute-book with his own hand. Mr. Wilson was President and Prime Minister combined. One great piece of legislation after another went scurrying through Congress at his behest.<sup>1</sup>

But when a President tries to give both momentum and direction to the work of Congress, his critics cry out that he is usurping a function which does not belong to him and thereby

The legislative activity of the President usually arouses criticism.

<sup>1</sup>The Federal Reserve Act, the Income Tax Law, the Clayton Act, the National Defence Act, the Adamson Law, the Overman Act, and all the war legislation.

violating the spirit of the constitution. Roosevelt was assailed in this vein by the Democrats, and Wilson just as bitterly by the Republicans. The fact is that both these Presidents were endeavoring to remedy a very serious defect in the American system of government, the most serious of all its defects, namely, the absence of provision for effective leadership in lawmaking. The constitution provides Congress with no recognized leader. It assumes that 531 legislators will lead themselves. Left alone they usually do lead themselves—into chaos. It is one of the most elementary axioms of government that leadership of some sort there must be if the work of lawmaking is to be done in orderly fashion. To desire the end is to tolerate the means. The President is warranted in assuming the rule of a prime minister, because there is nobody else in a position to do it. The people look to the President rather than to Congress for the redemption of pledges made in the platform of a victorious party. He must, therefore, be active in promoting legislation or he will be forced to bear the onus, under the party system, of failing to fulfil his preëlection promises. This is an outgrowth of the President's status as a party leader, a matter to be discussed presently.

Another phase of the President's legislative powers: the system of "executive orders."

Within the last few decades there has grown up in the United States, moreover, the practice of determining many matters by means of "executive orders," issued by the President and having virtually the force of law. These orders may almost be regarded as constituting what is known in France as ordinances, although the theory on which the ordinance power rests in the French Republic is commonly thought to be foreign to the entire spirit of American institutions. In France it is customary for parliament to enact the laws in general terms, leaving the executive branch of the government to make all the detailed provisions by the issue of presidential decrees or ordinances. But in the United States where we profess to have a "government of laws," the laws are usually framed to cover all contingencies and to leave no considerable amount of discretion to the executive authorities.

An explanation of this system.

The principle that laws should be specific in their provisions is sound, but it is sometimes difficult to follow. The laws deal, nowadays, with situations which are so unendlessly complicated that it is virtually impossible to frame them in such wise that they will cover every possible contingency. Take the federal



income tax law, for example. To specify every detail relating to exemptions, deductions, allowances and all the rest would expand the law to a thousand pages. Even then the detailed provisions, being hard and fast, would probably work a great deal of injustice. So Congress is veering over to the European practice of omitting minor details from the text of the laws and providing that these shall be regulated by executive order. The President (or the heads of departments with his permission) issues large numbers of these executive orders which have all the force of law. These orders regulate the details of administration in the postal and immigration service, the collection of customs duties and internal revenue, the civil service system, the patent, pension, and land offices, and in many other branches of public administration. Let it be made clear that executive orders and regulations do not profess to amend or repeal any law, but merely to supplement, elaborate and apply the provisions of congressional statutes. In effect, however, they really do more than they profess to do. They actually modify the strict application of legal provisions with a great deal of freedom. For they are at times issued without any specific warrant of law, being put forth under the President's general power "to see that the laws are properly executed." This development, as will appear more clearly in connection with the work of the executive departments, is a tacit admission that under the complex economic and social conditions of to-day a government cannot well remain strictly a "government of laws." The inflexibility of law must be softened somehow.

These are the positive powers of the President in lawmaking. He also has a negative or restraining power of even greater importance, which we call the veto power. The scope and nature of this power cannot be more succinctly expressed than by quoting the exact words of the constitution on the point:

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and

The veto power.

nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."<sup>1</sup>

The qualified veto is a compromise.

How did the framers of the Constitution come to adopt this provision, this distinctly American contribution to the science of government? They devised it in accordance with their policy of choosing the mean between two extremes. They were not prepared to give the President an absolute veto such as the governor had possessed in colonial days. They did not believe that the President should have an absolute veto like that of the English monarch whose sway they had just thrown off. They were mindful of the indictment of George III in the Declaration of Independence for having "refused his assent to laws the most wholesome and necessary for the public good." They were determined not to give any weapon of despotism to the chief magistrate of the Republic, although Alexander Hamilton argued that an absolute veto power would never be abused in the future as it had been in the past. On the other hand, the makers of the constitution did not think it proper that the laws should be made in sheer defiance of the President's rights or wishes. Experience with parliament in colonial days had shown that a legislature could be quite as tyrannical as a monarch and that it could usurp the prerogatives of the other departments of government. The lessons of history seemed to demonstrate that no legislative body could be kept within its own sphere of action by any "mere parchment delineation of boundaries."<sup>2</sup> The executive ought, therefore, to be given some sort of bludgeon to wield in its own defence. So the "qualified veto" was devised as a compromise between an absolute veto and no veto at all. It was agreed upon as a thrust-and-parry arrangement, establishing what Hamilton was ready to defend as "a salutary check upon the legislative body" and at the same time a "shield to the executive." Apparently the framers of the constitution looked upon the President's veto as a legislative rather than as an executive function, for they inserted it in that part of the

<sup>1</sup> Article i, Section 7.

<sup>2</sup> *The Federalist*, No. 73.

constitution which relates to the organization and powers of Congress.<sup>1</sup>

If you read carefully the veto clause of the constitution, as above quoted, you will see that measures which are passed by Congress must be sent to the President and that any one of four things may happen when a bill reaches the presidential desk. First, he may sign it. That is what he does in the great majority of cases. Second, he may return it unsigned, within the space of ten days, to that branch of Congress in which it originated. The constitution requires that in returning it he shall state his objections, but these need not be specific. A mere statement that the measure is unwise or untimely or extravagant is enough. At any rate, when the measure comes back to Congress it is again voted upon, and if adopted in each House by at least a two-thirds majority it becomes a law notwithstanding the President's disapproval. In popular parlance it is "passed over his veto." Third, the President may neither sign the measure nor return it. He may let it lie on his desk until the ten-day limit has expired. In that event the bill becomes a law without his signature unless Congress has meanwhile adjourned. But if Congress has adjourned (and this is the fourth eventuality), it does not become a law. It gets what is popularly known as "the pocket veto."

The  
procedure  
in vetoing  
a bill.

A few words of explanation should be added with reference to these four methods of settling the fate of bills which come to the President's desk. The ten days do not include Sundays, nor does the time begin to run until the bill actually reaches the President. When President Wilson was in France the bills did not reach him, in some instances, for more than ten days after they had passed both Houses. As a rule the President quickly signs those bills which he approves and vetoes those which he disapproves, but if his mind is not strongly set in either direction he may ignore the measure altogether. In this way, when ten days expire, he throws the whole responsibility upon Congress. Likewise many bills perish by way of the pocket veto at almost every session of Congress. This is because large numbers of measures drag along on the congressional calendar until

<sup>1</sup>"It has been suggested by some that the veto power is executive. I do not quite see how. . . . The character of the veto power is purely legislative."—W. H. TAFT, *Our Chief Magistrate and His Powers* (N. Y., 1916), p. 14



the closing days of the session and are then rushed through their final stages. The President gets them in big batches and it is sometimes impossible for him to give each bill the consideration which it deserves. So he takes the ones which he approves, and signs them, leaving the rest to die a natural death. While the wording of the constitution might seem to imply that the President cannot sign a bill after Congress has ended its session, this is not the case. He may, and does, sign bills within ten days thereafter. But bills which he does not sign within this period are rendered nugatory.<sup>1</sup>

Was it intended that the veto should be used freely or only on rare occasions? Alexander Hamilton was of the opinion that it would be used too little, rather than too much. Washington, Adams, Jefferson, and Madison, the four Presidents of the constitutional group, used it with great restraint. During the first forty years of the Republic, only nine bills were vetoed, an average of less than one for each administration. And in every case, during these four decades, the veto was based upon some inherent defect of the measure, not upon the President's personal objection to it. Not one of them, moreover, was passed over the veto.

Andrew Jackson, however, set a new record in this as in several other things by vetoing nearly as many as all his predecessors put together. This was because Jackson interpreted the veto power in a way quite different from that of his predecessors. Their attitude had been one of non-interference with the law-making authority of Congress except where intervention by means of the veto power seemed necessary to prevent an unconstitutional or defective law from going on the statute-book. But Jackson took a more aggressive stand, using the veto to stay the hand of Congress whenever its action seemed to run counter to his own political or personal aims. This interpretation was bitterly criticized in its day as revolutionary and a usurpation, but with the lapse of time it has gained general acceptance. From Jackson's time until after the Civil War, however, vetoes did not increase, and during his entire term of office Lincoln negatived only two general measures. President

<sup>1</sup> See the article by Professor Lindsay Rogers on "The Power of the President to sign Bills after Congress has Adjourned," in the *Yale Law Journal*, xxx, pp. 1-22 (November, 1920).

Extent to which the veto power has been used.

Jackson, Johnson, and Cleveland.



Johnson during his quarrel with Congress swung his battle-axe right and left, but not to much avail because Congress regularly passed its measures over his veto. Since 1867 the only President to use the veto power unsparingly was Grover Cleveland, who applied it to a large number of private pension bills, but all of the Presidents since his time have employed it more freely than it was used in the first quarter of the nineteenth century. They have not confined themselves, moreover, to measures which by any stretch of the imagination could be regarded as encroachments upon their own constitutional prerogatives, but have assumed the duty of vetoing any measure that seemed to be unwise or inexpedient. What was intended, therefore, to be a presidential weapon of self-defence has developed into an implement which can be and is regularly used for guiding and directing the lawmaking authority of the nation. It has been expanded into a general revisory power, applicable to all measures of whatever sort. It has virtually developed the presidency into a third chamber of Congress. The veto power has made the President a far more active factor in legislation than he originally was, or was intended to be.<sup>1</sup>

Foreign students of government sometimes ask whether the veto power has, on the whole, served a good purpose. Lord Bryce believed that it had. Hamilton's prediction that vetoes would be relatively few has been entirely fulfilled. For apart from private pension bills and other measures of personal, political, or sectional favoritism, the vetoes have not averaged one per year. Ninety-nine per cent of all the measures passed by Congress regularly go upon the statute-book. The veto power, save in very exceptional instances, has not been abused. For the most part it has been exercised prudently and with good reason. More often than not, public opinion has been with the President in the use of the veto and has quickly compelled Congress to back water. Since the founding of the Republic the veto has been applied to about 600 measures, but it has been overridden less than twenty-five times, and fifteen of these instances came during the era of bad feeling between Andrew Johnson and his Congress.<sup>2</sup>

Merits and defects of the veto system.

<sup>1</sup> E. C. Mason, *The Veto Power* (Boston, 1890), gives a full account of the use and abuse of the veto power during the first century of its history.

<sup>2</sup> Cleveland alone vetoed more than 200 private pension bills.

Many years ago the increased use of the veto by Presidents Jackson and Tyler led to an agitation for its abolition or amendment, and Henry Clay in 1842 proposed that a mere majority instead of a two-thirds vote should be prescribed as sufficient to pass any measure over the veto, but the plan never made much headway, and the agitation soon subsided. There is at present no serious or widespread feeling that the veto power ought to be taken away or made less effective, and on the whole the system is now regarded by Americans as one of the excellences of their political system. Yet no European country has seen fit to copy it. Some federal constitutions, including those of Canada, Australia, and Switzerland, have borrowed considerably from the political institutions and experience of the United States, but the qualified veto is not among the things that they deemed worth copying.

Veto power  
does not  
extend to  
items in a  
measure.

One improvement in the American veto system has been strongly urged, namely, that the President be allowed to strike out single items in an appropriation bill, a power which he does not now possess. At present he must either veto the bill as a whole or leave it as it stands. In consequence the President must often give his consent to items which he does not approve; otherwise the entire bill would fail. Appropriation bills often include hundreds of items, and all of them, save a very few, may be entirely proper ones. These few may be pernicious and wasteful, yet the President must take the chaff with the wheat. Otherwise he is left without funds with which to carry on some important branch of administration.

Many wasteful expenditures have gone past the most vigilant Presidents in this way. A constitutional amendment giving the executive power to veto some items while accepting others might serve in some ways a good purpose; on the other hand it would enormously increase the influence of the President in legislation, giving him a new form of patronage almost equal to that which he now has through the exercise of his appointing power. All congressmen, both senators and representatives, are greatly interested in securing appropriations for use in their own states or districts. The partial veto, in the hands of a partisan or vindictive President, could easily be used to penalize those who oppose him and to advance the interests of those who support his policies. The remedy might readily prove worse than the exist-

ing evils. Since the adoption of the national budget system, however, the whole question has tended to right itself.<sup>1</sup>

Not all votes of Congress are subject to the veto. Proposals to amend the constitution, when passed by a two-thirds vote of Congress, do not require the President's signature and hence cannot be vetoed by him. The same is true of the "concurrent resolutions" which both Houses of Congress adopt from time to time and which are merely expressions of congressional opinions, not having the force of law. "Joint resolutions," however, do have the force of law; they are submitted for the President's signature and may be vetoed. The difference between a bill and a joint resolution is merely of technical importance.

The President's influence upon lawmaking may be exerted not only by actually using his veto power but by threatening to use it. When a measure is in its earlier stages, even before it has been reported to Congress by a committee, he can make his disapproval known. This he may do openly, by a public announcement, or he may prefer to speak his mind privately to the leaders of his party in Congress. The certainty that a bill will not receive the President's signature often puts a damper on congressional enthusiasm for it. On the other hand, Congress sometimes lets a measure go through with the hope and expectation that it will be vetoed. The congressmen prefer to let the President bear whatever odium may come from its rejection. But we must not take the exceptions for the rule. Congress does not ordinarily pass measures to which the President is opposed. The two arms of the national government normally work in coöperation and this is particularly true when both are controlled by the same political party.

Surveying as a whole the President's powers in relation to lawmaking, it will be seen that whatever the purpose of the constitution may originally have been, the actual influence now exerted by the executive in matters of federal legislation is very extensive. It is both constructive and restraining in its activity. The President, in a constructive sense, recommends legislation to Congress by message and follows up his recommendations by the

Nor to constitutional amendments nor to concurrent resolutions

Threats of a veto are not uncommon and have their effect.

Conclusions on the President's powers in relation to lawmaking

<sup>1</sup>The constitution of the Confederate States, adopted in 1861, conferred upon the President of the Southern Confederacy the right to veto individual items. Attention may also be called to the fact that the governors, in most of the states, have been given this power.

use of political and personal pressure. He may use his patronage, and his prestige as the leader of his party, if need be, to make his wishes prevail. In a restraining sense, on the other hand, his influence is exerted by the exercise of his veto power or by threats of exercising it. Putting the two forms of influence together, it is a far-reaching legislative influence, and much more extensive than that possessed by the chief executive in any other country.

#### 4. Military powers.

In all countries the chief of state is nominally the head of the armed forces. By express provision of the constitution the President is commander-in-chief of the army and navy of the United States, and this includes the militia forces when called into the federal service. He appoints all the regular and reserve officers of the army and navy, but officers of the militia, when not in the service of the United States, are appointed as the laws of their several states may direct.<sup>1</sup> Congress determines the size of the army and navy, and votes the appropriations; but the expenditure of these funds is in the hands of the war and navy departments, both of which are directly under the President's control. Congress also makes the general laws under which the military and naval forces are organized and maintained, but a large discretion in the making of detailed regulations is left with the President and his advisers, particularly in time of war. The President directs the location and movement of the nation's armed forces and by the exercise of this authority may bring about a state of war, leaving Congress no option but to recognize an accomplished fact by the issue of a formal declaration. Under his war powers the President may provide by proclamation for the government of conquered territory until Congress provides a permanent form of administration. No one has ever accurately defined the powers of the President as "commander-in-chief," and no court has ever placed any fixed limit upon them. They expand with the needs of the situation in war time and potentially are as great as any ever exercised by Oliver Cromwell or Napoleon Bonaparte. Lincoln, in his day, demonstrated that the war powers were enormous, and President Wilson, during the world war, showed that these powers have in no wise diminished. It is not merely that the constitution gives

<sup>1</sup> C. A. Berdahl, *The War Powers of the Executive in the United States* (Urbana, 1921).



the President great powers for use in war time. When the nation faces a great emergency Congress is usually willing to give the President all the authority he asks for. It is one of the cardinal virtues of the American constitution, despite its reputed inflexibility, that in no great military emergencies has it ever prevented the "incisive application of a single will."

In the matter of guaranteeing to each of the states a republican form of government, protecting them from invasion, and putting down internal disorders, the constitution intrusts powers to the federal government which the President usually exercises on its behalf. In the event of an invasion or of any attempt to supplant the republican form of government the intervention may take place without any request from the state concerned. But in the case of domestic violence the federal government may not step in unless its assistance is requested by the authorities of the state in which the disorder has arisen. This request is made by the state legislature if in session; if the legislature be not in session, it is made by the governor. When, however, the disorders within any state obstruct any function of the federal government, such as the collection of import duties or the carrying of the mails, the President may intervene without waiting for any invitation from the state authorities. President Cleveland, in 1894, sent federal troops into Illinois, despite the opposition of the authorities in that state, to secure the free passage of the mails and of interstate commerce during a railway strike. The Supreme Court upheld the exercise of this authority.<sup>1</sup>

The maintenance of domestic peace.

All the foregoing powers are vested in the President by the constitution and the laws of the United States as interpreted by the courts. There is a fifth class of powers, or, to speak more accurately, a form of official influence, which the President does not obtain from this source, but which he possesses by virtue of his position as leader-in-chief of his own political party. The President is a party-man, elected as such. The members of his cabinet are fellow-partisans. The national committee

5. Political powers.

<sup>1</sup> "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the services of the nation to compel obedience to its laws." *In re Debs*, 158 U. S. 564.

of his party is so organized as to be in sympathy with him. His party leaders in Congress must work in reasonable harmony with their chief, otherwise a common program cannot be carried out and the party is likely to go down to defeat at the next election as the penalty of its own disunion. The President, therefore, while not himself possessed of a seat in Congress, is unable to escape all responsibility for what Congress may do or fail to do. The White House is the biggest pulpit in the country. Millions of people look to it for guidance on the issues that are being debated in Congress. They want the President to tell them what they ought to think. And they want him to translate these thoughts into action. The masses of the American people do not know or care anything about the principle of checks and balances. They do not look upon their government as an affair that is cut up into watertight compartments. They remember only that they voted for a President at the last election in the expectation that he would carry out a certain program, and they insist that there shall be no falling down on the job.

This makes the President's task a difficult one at best, and sometimes practically impossible. He has been elected on a party platform containing many definite pledges. He is the recognized leader of his party, its chief executive. As such it is his duty to see that the pledges are fulfilled. But this can only be done when Congress is ready to coöperate with him, which it sometimes is not. Congress, indeed, may contain a majority (in one or the other House) which is politically hostile to the President, and even when it is dominated by his own co-partisans it may refuse to do his bidding. Under such circumstances there are two alternatives open to the President, neither of them altogether agreeable. He may assail Congress, browbeat it, appeal to the public opinion of the country against it, and gain his point in that way. For so doing he will be called a usurper, a would-be dictator, a boss, a man of lawless mentality. In a republic the man on horseback always rides for a fall. Or, he may meet Congress half-way, giving in to it on some matters for the sake of getting others, compromising and trying to preserve harmony. Then the country will cry out that he is spineless, a trimmer, a rubber-stamp. Blessed are the peacemakers in politics for they too shall be cursed. The trouble is

that the American people want the President to be a prime minister and then get irritated with him when he assumes that rôle. Every voter clamors for leadership; when there is little he wants more, and when there is plenty of it he demands less. Cleveland, Roosevelt, and Wilson all found it so.

The instinct of the country is for unified action, Woodrow Wilson once wrote, "and it craves a single leader."<sup>1</sup> But the constitution of the country does not provide a single leader and no President can assume that position without trenching upon the independence of the national legislature. Thus does the country's instinct (which is sound) conflict with the frame of government which in this particular is defective. Mr. Wilson, two years before he became President, expressed the conviction that "the personal force of the President is perfectly constitutional to any extent to which he chooses to exercise it."<sup>2</sup> That conviction he undertook to apply during his eight years in office. The way in which the country welcomed a "return to normalcy," (in other words, to the traditional method of government by checks and balances), would seem to indicate that it is not yet ready for a plan of government by the personal force of the President.

The swing of the pendulum from men of strong personality to the very antitheses of such men has been a noteworthy feature in the presidential campaigns of the past thirty years. Grover Cleveland gave place to William McKinley, and he, in turn, to Theodore Roosevelt. The dynamic Rooseveltian régime was succeeded by Mr. Taft's four years of legalism and compromise. Then came Mr. Wilson with a measure of assertive leadership which no President since Lincoln had ventured to assume. And in 1920 the country once more reacted from personal force to amiability.

The President of the United States, during his term of office, is immune from control by the courts. There is only one tribunal before which he can be called to answer for any offence or dereliction of duty, and that is the Senate of the United States sitting as a court of impeachment. There are two good reasons for this immunity. One is that the President, as commander-in-chief of the armed forces of the nation, controls the ultimate

The President and the courts.

<sup>1</sup> *Constitutional Government in the United States* (N. Y., 1911), p. 68.

<sup>2</sup> *Ibid.*, pp. 71-72.

power which enforces any judicial decision. Against him the courts would be powerless unless he chose to accept their decisions, and the Supreme Court long ago wisely decided that it would not attempt what Chief Justice Marshall termed "an absurd and excessive extravagance" of judisdiction. The other reason for the President's immunity from ordinary judicial process is to be found in his unlimited power to grant pardons save upon conviction by impeachment. There is no disability or restraint that the courts might impose upon him but could be at once removed by a stroke of his own pardoning power. The one great safeguard which the constitution provides against the abuse of presidential powers or presidential malfeasance of any sort is the privilege of impeachment.



## CHAPTER X

### THE CABINET AND NATIONAL ADMINISTRATION

Nothing will appear more certain, on any tolerable consideration of the matter, than that every sort of government ought to have its administration correspondent to its legislature.—*Edmund Burke*.

Tried by their own aims, the founders of the United States were wise in excluding the ministers from Congress.—*Walter Bagehot*.

The practice of surrounding the chief executive with a circle of advisers, chosen by himself, is one of the oldest in the history of government. It appeared in England under the Anglo-Saxon kings and became fully recognized as an integral feature in the government of the realm under the Normans. During the long period between the first of the Plantagenets and the last of the Stuarts the institution known as the privy council, composed of the royal ministers or advisers, assumed administrative functions of comprehensive importance in England, and it was from this body that an inner circle, henceforth known as the cabinet, developed under the Hanoverians to the position which it occupies at the present day. Originally made up of advisers selected by the crown and not accountable to parliament, the English cabinet has become, during the past two centuries, the creature of the majority party in the House of Commons, and responsible to the crown in legal fiction only. It is to-day the real executive organ of the United Kingdom, the great standing committee of parliament.

In one sense the English and American cabinets are alike. Neither has any constitutional foundation. In England the basis upon which the cabinet stands is usage alone; in the United States the constitution contains no provision for a cabinet and makes only incidental references to "heads of departments," from whom the President may ask opinions and who may be authorized by law to appoint their own subordinates. Here, too, the cabinet as a body rests upon usage. But aside from

The  
genesis  
of the  
cabinet.

Its lack  
of legal  
basis both  
in England  
and in the  
United  
States.

this similarity in the mutual lack of any legal basis the cabinets of the two countries are unlike in every important respect. Without the cabinet the whole scheme of English government would fail to function; if the cabinet were to be abolished, the entire frame of English administration would have to be remodelled, for it has become the pivot on which all else now revolves. The same thing is true of the French Republic in which the President can perform no official act without the approval of his ministers. But the cabinet of the United States, as such, plays no essential part in the government of the nation. The wheels of federal government would run just about as smoothly if the heads of departments formed no organized group and if no cabinet meetings were held from one end of the year to the other.<sup>1</sup>

The framers of the constitution did not regard a cabinet as essential.

The builders of the American federal system were indistinctly aware of the important rôle which the cabinet had assumed in the practical working of English government during the eighteenth century, and they were also well acquainted with the work of the executive councils which had existed in some of the colonies before the Revolution. That they did not make specific provision for any such body in the constitution of 1787 is presumptive evidence that they at least did not regard it as a necessity, and perhaps did not desire any body of the sort. They realized, however, that the President could not alone perform all the administrative functions that the Union would require, and indeed the experience of the nation under the Articles of Confederation had shown that executive officers, each in charge of a department, were essential to the proper despatch of business. So they merely assumed that the President would place worthy men in charge of the various departments, and they specified neither what these departments should be, nor what authority they should exercise. They did not even

But made provision in the constitution for heads of departments.

<sup>1</sup> John A. Fairlie's *National Administration of the United States of America* (2d ed., N. Y., 1914) is still the best book on the subject of cabinet organization and functions. A later work on *The Development of National Administrative Organization in the United States* by L. M. Short (Washington, 1923) deserves mention. The Institute of Government Research is publishing a series of "service monographs" covering each branch of the national administration. On the development of the cabinet, its personnel at various periods, and its relations with the President, see H. B. Learned, *The President's Cabinet* (New Haven, 1912), and M. L. Hinsdale, *History of the President's Cabinet* (N. Y., 1911).

indicate in the constitution whether these departments should be established by the President or by Congress. "The President . . . may require the opinion in writing of the principal officer in each of the executive departments. . . ." That is all the constitution has to say about the President's relation to his chief executive advisers. As a matter of fact, however, the various departments one after another have been created by Congress. Three of them, indeed, were established at its first session in 1789. These were the department of state, the department of the treasury, and the war department. The offices of the attorney-general and postmaster-general, which were established in the same year, did not at first rank as regular departments. They became departments, however, in the course of time, and Congress has also added others: the navy in 1798, the interior in 1849, agriculture in 1889, commerce in 1903, and labor in 1913. There are now, accordingly, ten administrative departments whose heads are by custom entitled to membership in the cabinet.

Departments which have been established by Congress.

The head of each department (secretary of state, attorney-general, postmaster-general, as the case may be) is appointed by the President with the consent of the Senate. But this consent, as has already been stated, is now never withheld. The President announces his selections immediately after his inauguration, and the heads of departments, as a rule, hold their posts till the end of the President's term, although they may be removed by him at any time. Removals in the ordinary sense have not been common, but resignations because of failure to work in entire harmony with the President have been numerous. Only in rare cases can it ever become necessary for the President to dismiss any member of his cabinet. A hint that a resignation would be acceptable is ordinarily quite enough. Occasionally the head of a department may serve through the term of more than one President, particularly if the succeeding President be of the same political party. No head of a department may sit in either the Senate or the House of Representatives; in this respect there is a marked contrast with the English system, which requires that every member of the cabinet shall have a seat in parliament. Nor has any member of the American cabinet the right to be heard in either House of Congress, as is the arrangement in the French Republic where every member of the

Status of these department heads.

misistry may sit and speak (but not vote) in both the Senate and the Chamber of Deputies.

How  
selected.

In selecting the ten heads of departments who form his cabinet the President is not limited either by the constitution or laws in the range of his choice. He may select whom he pleases. But there are practical considerations which to some extent direct his actions. As a rule all are chosen from his own political party. Washington endeavored to select his cabinet from among the men of different political inclinations; he made Thomas Jefferson his first secretary of state and Alexander Hamilton his first secretary of the treasury. Both were admirably qualified for their respective offices, but they stood widely apart in their political views and were continually at odds, to Washington's great embarrassment. So the practice of choosing the cabinet from the President's own political party was thereupon adopted and it has ever since been rigidly followed except in a very few scattered instances. This does not mean, however, that the President usually selects the members of his cabinet from among the party leaders. Some of them may be of this rank, but for the most part the choice has fallen upon men who have not been party leaders in the usual sense of the term.

Geograph-  
ical and  
other con-  
siderations.

Within the ranks of the party, moreover, the selections must be made with an eye to geographical representation. A President cannot wisely take all his immediate advisers from the North or the South, or from the East or the West. If he did there would be vigorous protests from the unrepresented areas. On the other hand, there is no obligation to distribute cabinet positions on an exact basis. Sometimes a single state may be called upon for two, or even three, members of the cabinet, but in general this is not deemed good political strategy. Regard must also be paid, as a practical matter, to the desirability of conciliating the different factions of the party, if such there be, and some of those who have been the President's right-hand men during the campaign for his nomination and election are sure to expect, and usually receive, recognition. It was generally believed, for example, that President Wilson's selection of Mr. Bryan in 1913 was dictated as much by sentiments of gratitude as by those of personal or political admiration. Frequently, in past years, the President's strongest competitor for the party nomination has been taken inside the breastworks after the



battle. Now and then the selection is made solely because the appointee is peculiarly well fitted by administrative experience to be placed at the head of some department; but in the main the choice is determined by personal or political reasons.

And rightly so, for the cabinet is first of all a circle of advisers and every President desires to have his most trusted counsellors close at hand. This is a point of view which the critics of a new administration do not usually appreciate. They complain because an incoming President brings with him to Washington some of the men whose counsel he has been seeking and following for years—his law partner, for example, or his campaign manager. These critics approach the matter from the wrong angle. The cabinet is not intended to be a representative body, or a check upon the President. It is intended to be what he chooses to make it. Its relation to him is intended to be personal, and according to the theory of American government it cannot be too much so, for the President bears all the responsibility and the cabinet bears none.

So the cabinet of the United States is a composite, in the making of which partyism, geography, conciliation, compromise, gratitude, political strategy, administrative skill, and personal intimacy all play a varying share. A President is known by the cabinet he makes, even as the ordinary citizen is known by the company he keeps. President Wilson chose men (or tried to choose men) whose "minds ran along with his own." President Roosevelt inherited a cabinet with a variety of minds, but by the force of his assertive personality soon had them all marching in line with his. In any event it is the President, and not the cabinet, that determines the success or failure of an administration.

In discussing the powers and functions of the cabinet it is advisable to make a distinction between those functions which are performed by the cabinet as a whole, and those which are exercised by the members of the cabinet individually, as heads of their own departments.

Powers and functions of the heads of departments:

It has already been stated that the cabinet, as a body, has no constitutional or statutory powers. There is nothing which can be done with its consent which could not be done without its approval if the President should so decide. It is merely a group of high officials whom the President may or may not call to-

1. as a body.

gether for consultation as he chooses. Yet its members meet in council once or twice each week and seem to find plenty to do at these meetings. What is there to do? Briefly the cabinet discusses whatever the President may see fit to lay before it and gives its advice to him when he asks for it. Sometimes the President has already made up his mind and merely brings a matter before the cabinet for suggestions as to details. Lincoln, for instance, did not consult his cabinet on the Emancipation Proclamation until he had himself fully decided that it ought to be issued. Andrew Jackson, a generation earlier, found his cabinet an encumbrance upon his freedom of decision and entirely discontinued its meetings. When Jackson had once made up his mind he did not want the tedium of explaining the process to a group of department-heads whom he regarded as high-class clerks. In general, there has been a world of difference in the personality of the Presidents and hence in their relations with their respective cabinets. Four or five members of his cabinet virtually controlled President Buchanan during the latter part of his term. Franklin Pierce always sought cabinet advice and followed it. General Grant, on the other hand, carried his military traditions into the White House and dealt with members of his cabinet as subordinates whose duty it was to carry out the orders of the commander-in-chief. The subject is one on which it is impossible to generalize, for no two Presidents have done exactly alike.

But even the most strong-willed President nowadays submits a great many matters to his cabinet for discussion. Questions are rarely put to a vote, for the simple reason that the President's own vote would outweigh the other ten; but from the nature of things the discussion which takes place at cabinet meetings is bound to influence the President's attitude. For it is a discussion with men whom the President has himself chosen as sound and sensible advisers. If their collective counsel were not worth heeding, why should he bring them together?

The cabinet meets regularly twice a week, and may be summoned for a special meeting by the President at any time. The members sit at an oblong table, in order of seniority, the President at the head, the secretary of state on his right, the secretary of the treasury on his left, and so on down both sides of the table. The Vice President, when he attends, sits at the foot.

directly facing the President. Meetings of the cabinet are secret, and no formal record of the discussions is ever kept or given to the public. Whether the President asks, receives, accepts, or disregards advice from his cabinet is never known, save in rare instances, and then long after the event has passed. Outwardly the cabinet, as in England, must display the appearance of solidarity. If there are important disagreements of opinion, they must be composed within the cabinet itself by the President's friendly intermediation. No head of a department can openly criticize either the President or his own colleagues and remain a member of the cabinet. The best service performed by the frequent cabinet meetings is that of avoiding conflicts or misunderstanding among the several departments, thus enabling the administration to put unity into its program. To this end the President usually calls upon the members, one after another at each meeting, to present any matter that may seem to concern the interests of more than one department or which may raise some issue of general policy. If a member is in doubt, he consults the President beforehand. The cabinet has no rules of debate; no motions are made or amended, and no speeches are delivered. But the President, if he be a good *raconteur*, as Lincoln and Roosevelt were, will frequently relieve the routine by punctuating it with stories which may or may not be relevant to the business in hand.

More vital than the functions of the cabinet as a whole are those of its members as individuals, as heads of departments. Every head of a department is responsible to the President and is under his direction at all times, but in practice each is allowed a considerable range of independence. This must necessarily be the case, for if everything could be supervised directly by the President himself, there would be no need for departments at all. Even in a single department, indeed, there is always more to do than the official at its head can personally attend to, hence each department has one or more assistant secretaries who assume part of the work which would be done by the chief if there were less of it to do.

Each department, moreover, is divided into bureaus under bureau chiefs or commissioners. This internal organization of the department is in almost all cases prescribed by law; it is not left, as in most other countries, to be arranged by presidential

2. as individuals.

The disintegration of departmental machinery.

decrees or executive orders.<sup>1</sup> The scope of work to be handled by these bureaus and divisions is very extensive. No head of a department, much less a President, can ever hope to keep the run of it. With the expanding functions of federal government, moreover, it is growing by leaps and bounds. The administrative machinery at Washington is now a dozen times more complex than it was a generation ago. Not only has the work of the various departments been divided, re-divided, and subdivided among subordinate bureaus, but many new administrative boards and commissions, some of them exercising functions of the highest importance, such as the interstate commerce commission, the federal trade commission, the civil service commission, the tariff commission, and the farm loan board, have been established altogether outside the purview of the ten regular departments. Of these, however, more will be said presently.

General  
work of the  
depart-  
ments.

Each department and each board or commission has its own special functions to perform, these functions being roughly indicated by their respective titles. The exact scope of their work is largely defined by law. Within the bounds thus set the head of the department has the right to make regulations affecting the conduct of business within his own jurisdiction. Each has also been given by law, in many cases, the right to issue departmental orders, some of which may be of great importance. The amount of work to be done by the different departments varies greatly—in ordinary times the treasury department has probably the largest amount of business to handle, while the department of labor has the smallest, although its functions are by no means inconsiderable.

Functions  
of a  
depart-  
ment head.

It would be impossible, in a single paragraph, to give more than the barest outline of what the head of a department at Washington is supposed to do in the course of his day's work. He makes various appointments, for Congress has put some patronage directly into his hands. He issues regulations on various matters within his jurisdiction; these regulations are prepared by subordinates but they must be approved by the department-head. He must deal with all manner of complaints

<sup>1</sup> For the duration of the world war, however, Congress (by the Overman Act) gave the President power to rearrange the various divisions of the departments, and to redistribute their work, by executive order.



against heads of bureaus and other officials in his department; he hears and determines appeals from their rulings; he listens to senators and congressmen who come with their multifarious suggestions, recommendations, and requests for favors. He goes before committees of Congress when called upon, and he supervises the preparation of all data that either Congress or the President may request. All important questions of departmental policy come to his desk for decision, and to make an intelligent decision he must wade through piles of memoranda and reports. Finally, he must attend gatherings of all sorts, make speeches, receive delegations, attend official receptions, and get a little home life if he can.

Many people think of government in its negative or restraining aspects only. The government, as they see it, is an organization that keeps foreign enemies away, prevents disorder, prohibits wrongdoing, and in general stands in the way of man's inhumanity to man. But this is only one aspect of the government's work, and by no means the most important one. Government is a constructive factor in the life of the nation. It does not merely prohibit. It promotes. Most of the functions performed by the various administrative departments of the national government are of a positive character; they involve the doing of things for the benefit of agriculture, industry, commerce, transportation, banking, labor, public health, education and other interests which come close to the daily life of every citizen. The national government is not something afar off. Its work is vital to the safety, health, prosperity, comfort, and convenience of every household in the land. This will be apparent from even a brief survey of what the ten chief departments do.

Their  
positive  
character.

Let us examine, therefore, one by one, the organization and chief functions of these various executive agencies. The state department is the oldest, and the secretary of state is for that reason the senior member of the cabinet. But he is not a prime minister in any sense of the term. He has no right to call a meeting of the cabinet when the President is ill or absent. Secretary Lansing was ostensibly dismissed by President Wilson for having done this. The state department deals chiefly with foreign and diplomatic affairs. It is the channel of intercourse between the government of the United States and all foreign

The state  
depart-  
ment: its  
functions:

1. diplo-  
matic.

governments; likewise the medium of communication between the national and state governments in this country. It performs the actual work of negotiating treaties, sending and receiving diplomatic correspondence, giving instructions to American ambassadors abroad, issuing passports, communicating with the governors of the various states, and so on. The secretary of state, therefore, is the American minister of interstate and foreign affairs. But the foreign work is usually performed under the President's close supervision.

The  
foreign  
service.

A word as to the foreign service. The United States sends and receives certain diplomatic officials known as ambassadors, ministers, secretaries, counsellors, and attachés. They are appointed by the President with the consent of the Senate; their business is to look after American interests in the countries to which they go; they report regularly to the secretary of state and get their instructions from his office. At the more important foreign capitals the American diplomatic representatives have the rank of ambassador; at the less important capitals the rank of minister. In duties and authority, however, there is no important difference between the two. The United States also sends and receives other officials known as consuls, and this branch of the foreign service is also in charge of the state department, but consuls or consuls-general are not primarily diplomatic officials. They are concerned chiefly with the task of furthering the commercial interests of their own countries. All ranks in the consular branch are now filled by competitive examinations at the bottom and by promotion at the top. The lower ranks of the diplomatic service are also filled in this way, but the highest positions (those carrying the rank of minister or ambassador) are still occupied for the most part by men whom the President chooses directly from civil life. Together the diplomatic and consular corps are known as the foreign service.

## 2. internal.

The secretary of state has functions also in relation to home affairs. He promulgates the laws which are passed by Congress; he is the custodian of the national archives or historic documents; he countersigns the President's proclamations, and he is the keeper of the great seal. To assist him in the performance of all his functions he has an undersecretary, and three assistant secretaries, also appointed by the President. The state department is divided into various bureaus, with separate work allotted

to each. Some notable figures have served the nation as secretaries of state: Thomas Jefferson, John Quincy Adams, Henry Clay, Daniel Webster, William H. Seward, James G. Blaine, John Hay, and Elihu Root. These men have given the secretaryship a fine tradition. In the early days of the Union the post was utilized on several occasions as a stepping stone to the presidency, but since the Civil War no one has moved from one office to the other.<sup>1</sup>

The department of the treasury is next in order of seniority. While the name might give the impression that this department corresponds to the exchequer or ministry of finance in other countries, its powers of financial leadership are much less extensive. In most other governments the chief financial minister possesses a well-defined initiative in matters relating to fiscal legislation; he introduces all money measures and defends them on the floor of parliament. In the United States the secretary of the treasury has no such formal authority. Financial measures are brought before Congress by its own committees. The secretary may advise or recommend; but his advice may be (and too often is) treated with scant consideration by both Houses of Congress. The secretary and his staff may go to a great deal of pains in framing a tax measure; then Congress will maul its provisions until the bill bears very little resemblance to the original. Public finance is a branch of economics, but the Congress of the United States has always dealt with it as a branch of politics.

It is here that the doctrine of separation of powers has worked its greatest havoc in wastefulness and extravagance. The services of the one department which knows most about the financial resources and needs of the government have been utilized to an amazingly slight degree in framing the tax-laws and determining the national expenditures. Congress has guarded with extreme jealousy its control of the purse, even to the extent of resenting advice from the administrative officials who are best equipped to tender it. In 1921 Congress established in the treasury department a bureau of the budget which is required to prepare estimates of necessary ex-

The treasury department.

Unlike the English exchequer or French ministry of finance.

<sup>1</sup> For a further discussion of the history and work of this department see Gaillard Hunt, *The Department of State of the United States, Its History and Functions* (New Haven, 1914).

penditures for the ensuing fiscal year. But this bureau, as will be explained in a later chapter, has nothing to do with the framing of revenue measures and has no final authority in determining the actual expenditures.<sup>1</sup>

One result  
of this  
difference.

If it be asked: Who, then, is responsible for the financial policy of the United States? the answer is that definite responsibility is placed nowhere. It is the waif of dark-lantern politics. For a few years in the early days of the Union, when Alexander Hamilton was secretary of the treasury, the United States had a definite financial policy and a statesman who was responsible for it; but that day has long gone by. The initiative, influence, and responsibility which Hamilton took into his own aggressive hands is now dissipated between the executive and legislative branches of the government to an extent which readily permits each to throw the blame on the other when expenditures are too large and taxes too high.

Work of  
the  
treasury  
depart-  
ment.

The actual work of the treasury department, nevertheless, is extensive and important. It may be grouped into four divisions. First, there is the collection of revenue, especially the supervision of work performed by customs officers and collectors of internal revenue. This includes the duty of issuing all regulations relating to this revenue service and the deciding of appeals which come to the department from the rulings of subordinate officers. Second, there is the custody of the public funds and the paying of all bills for expenditures which have been properly authorized. There is a treasury (with strongly-guarded vaults) in Washington. For many years there were sub-treasuries in nine important cities, but these were abolished in 1921 and the surplus funds of the government are now deposited, for the most part, in the various federal reserve banks.<sup>2</sup> But government money may also be deposited in national and state banks at the discretion of the secretary of the treasury under restrictions established by law. Third comes the entire supervision of the currency, including control of the mints which coin the money. These functions are directly intrusted to the comptroller of the currency, the director of the mint, and the director of the bureau of engraving which prints the paper money.

<sup>1</sup> See *below*, pp. 282-286.

<sup>2</sup> For a discussion of the federal reserve bank system, see *below*, pp. 297-299.



With this goes also the supervision and inspection of the national banks. The issue of bonds, likewise, when authorized by Congress, is in the department's charge. The annual budget, as has been said, is prepared for the consideration of Congress by one of the department's bureaus. The accounts of every other executive department, moreover, are audited under the supervision of the secretary of the treasury. Finally, there are some miscellaneous powers relating to the construction and maintenance of public buildings, the coast guard and life-saving service, the "dry navy" and the other measures for the prevention of rum-running, the quarantine and public health services, and the government printing bureau. This bare enumeration of important functions will at least suffice to show what a large and varied amount of work the treasury department has to do. The headship of this department has been held at various times by men of great financial ability, beginning with Alexander Hamilton and including among his successors Albert Gallatin, Salmon P. Chase, and John Sherman.

The war department in the United States is chiefly concerned, of course, with the maintenance and administration of the army. It has to do not only with the enlistment and equipment of men for all branches of the service, but with contracts for supplies, with fortifications, and the transportation of troops. Even in time of peace these functions are of no inconsiderable importance, but in time of war, they become tasks of stupendous magnitude, involving millions of men and billions of dollars. Even before the United States entered the Great War the internal organization of this department, with its eleven different bureaus, was complicated enough; to-day it is so elaborate that even the most elementary description would fill many pages. In addition to these military functions, moreover, the secretary of war has two important fields of civil authority. One is the supervision of certain public works undertaken by the national government, such as the dredging of harbors or the improvement of waterways. All the navigable waters of the United States are under the final jurisdiction of the war department. No obstructions to navigation (in the way of bridges or piers, for example) may be erected anywhere without this department's consent. The other function is that of supervising the administration of the insular possessions. The Philippines, Porto Rico, and the

The war  
depart-  
ment.

Panama Canal Zone are under the care of the war department, the two former having been left there since they were occupied by the armed forces of the United States during the Spanish War. Unlike the chief European countries, the United States has no department of colonial affairs. Three departments divide the work among them. The war department looks after the possessions just mentioned, but Alaska and Hawaii, being ranked as territories, are under the supervision of the interior department, while the navy department remains in charge of Guam and the Virgin Islands.

The head of the war department has usually been a civilian, but men of large military experience, Grant and Sherman, for example, have held the post at times. This is quite in contrast with the practice in the countries of continental Europe, where high officers of the army have been almost always selected for the post. Both methods have their respective advantages. An army officer is likely to have a better appreciation of the technical phases of the work, while a civilian may be much better qualified to handle such matters as contracts, transportation, the construction of public works, and the administration of the insular possessions. And the subordination of the military to the civil branch of the government is something that should at all times be clearly provided for in a democracy, even at the risk of some slight lapse in military efficiency.

The functions of the navy department are for the most part implied by its designation. The construction, arming, and distribution of the naval vessels, both regular and auxiliary, the establishment and maintenance of navy yards, the enlistment of men, the making of contracts for supplies, and the general administration of the country's armed forces afloat—all these branches of work are included. The secretary of the navy, like the secretary of war, is practically always chosen from civil life, and the technical work of the department is performed by various subordinate bureaus, each of which is headed by a naval officer of high rank. The marine corps comes within the jurisdiction of the navy department. The air forces are as yet divided between the army and the navy; they do not form a combined service as in European countries.

The attorney-general is the head of the department of justice and the chief legal adviser of the national government. The

Its head is usually a civilian.

The navy department.

President and the heads of departments call upon him regularly for his opinions with respect to points of law.<sup>1</sup> He is the representative of the nation in all legal proceedings to which the United States is a party. He conducts proceedings against corporations or individuals who violate the federal laws. He supervises the work of the federal district attorneys, commissioners, and marshals throughout the country. He investigates and reports to the President upon all applications for reprieves or pardons. His department has general oversight of the federal penitentiaries and other institutions of correction.

The department of justice.

The postmaster-general is what his title implies. His department has the largest number of employees (nearly 300,000 in all) and hence the greatest range of political patronage, although this has now been greatly diminished by placing most of the postmasterships in the classified service. He awards contracts for the transportation of the mails and for all other forms of service in his department. He assumes the oversight of the entire postal business of the United States, which is the largest single business enterprise of any sort in the world if one includes the rural mail service, the parcels post system, the handling of money orders, and the postal savings banks. An important authority possessed by the postmaster-general is that of denying the use of the mails to swindlers, promoters of lotteries, and all concerns which may come under the ban for using the service wrongfully. He may also debar any obnoxious publication from passage through the mails. These powers have been extensively used in recent years.

The postmaster-general.

The department of the interior has a title which gives not the slightest clue to its functions. In the countries of Continental Europe there are departments called by this name and they have mainly to do with the supervision of local government, that is, the government of counties, cities and towns. But the department of the interior at Washington has nothing to do with local government. It has a great variety of functions and they are of such a miscellaneous nature that it has been facetiously termed the "department of things in general." These functions can be enumerated (if one has the time and patience to do it), but they cannot be grouped or classified. Things which belong

The department of the interior.

<sup>1</sup> These *Opinions of the Attorney-General* are published, after the manner of judicial opinions, and often establish important precedents.



nowhere else have been turned over to this department, one after another, until it has become a rare hodge-podge of jurisdiction. For example, it has charge of patents, civil war pensions, Indian affairs, public lands (including the local land offices), the geological survey, the reclamation service, relations with Alaska and Hawaii, the prevention of accidents in mines, and, strange to say, the educational work of the national government, for the bureau of education is sheltered in this carryall of a department. To be interested in all phases of his work the secretary of the interior must indeed be a man of uncommon versatility.

The department of agriculture.

The secretary of agriculture has also acquired a varied list of responsibilities, but all of them have to do, in one way or another, with the winning of man's livelihood from the soil. They include the maintenance of agricultural experiment stations, and of various other institutions for the study of soils, plants, and livestock, the distribution of seed, the establishment of cattle quarantines, the inspection of meats and other food products, the making of scientific studies relating to road construction, irrigation and drainage, and the issue of bulletins, the control of the weather bureau and the forest service, the compilation of crop reports and crop forecasts, the management of the crusade against noxious insects, and many other things of an allied nature. If one desires an impressive illustration of the government's "constructive" work, there is none better than this. The department of agriculture, through the work of its thirteen bureaus, has enormously increased the productivity of the land. Its work is supplemented by the work of the states, most of which maintain their own departments of agriculture.

The department of commerce.

Two departments of relatively recent establishment are those of commerce and of labor. They were originally united but were divided in 1913. The department of commerce has to do with the development of foreign and domestic trade, the control of corporations, the licensing and inspection of steamboats, the regulation of fisheries, the lighthouse service, the making of coast and geodetic surveys, the taking of the census, the maintenance of the bureaus of standards, the publication of commercial statistics, and some minor matters.

The department of labor.

The department of labor has direction of the immigration service, the administration of the naturalization laws, and the adjustment of relations between labor and capital. It includes a



children's bureau to which is intrusted the execution of the federal laws relating to the employment of child labor in areas under federal control. There is also a women's bureau, a bureau of conciliation, a bureau of labor statistics, and a bureau of industrial housing—the work of each being broadly indicated by its title. In a word, this department seeks to do for the interests of labor what other departments have done for agriculture and commerce respectively.

Those are the ten regular departments. They are not arranged on any logical, orderly or systematic basis. They have grown up, one by one, to meet new conditions. When a new bureau is needed, it is put wherever seems most convenient at the time. Then, when a department becomes overcrowded with bureaus, some of them are shifted elsewhere, perhaps to a new department. Under the circumstances it is not surprising that one can detect a good deal of haphazardness, overlapping, and even absurdity in the existing organization. Everyone in Washington is aware of this. And from time to time it has been proposed to give the organization a general overhauling.<sup>1</sup> But there are all sorts of political, personal, and practical obstacles in the way, and nothing has yet come of the project. Likewise there are persistent clamors for the establishment of additional departments—a department of public works, of public health, of education, of public welfare, of highways, of conservation, and what not. President Coolidge, in 1923, recommended the creation of a department of public welfare, with a member of the cabinet at its head, this department to take over the bureaus of public health and of education together with various other functions.

Not all the administrative work of the national government is headed up into the ten regular departments. There are several branches of national administration whose heads are not members of the cabinet. These federal agencies, which for the most part are commissions or boards, have been established from time to time under the authority of Congress, but their members are appointed by the President with the consent of the Senate. For the policy of placing these boards outside the purview of the regular departments there have been various reasons, historical,

Summary.

Bureaus and boards outside the regular departments.

<sup>1</sup> See W. F. Willoughby, *The Reorganization of the Administrative Branch of the National Government* (Washington, 1923).

political, and personal. In the main, however, they deal with matters which are of such nature that they could not well be intrusted to subordinate officials in one of the regular departments and yet are not important enough to warrant the creation of new departments. Or, in some cases, the work is of a sort which can better be done by a board of three or five members than by a single official, however competent.

The interstate commerce commission.

The most widely known among these bodies is the interstate commerce commission, established in 1887 to supervise the execution of the national laws relating to foreign and interstate trade, more particularly the laws relating to the railroads. The original powers of the commission have been greatly extended by successive acts of Congress during the past quarter of a century. It is now composed of eleven members, each appointed for a six-year term by the President with the consent of the Senate. The work of the commission is quasi-judicial in its nature, for it adjudicates controversies between interstate transportation companies and shippers relating to rates and conditions of service. It has become the right hand of Congress in the exercise of the power to control interstate commerce and its work will be discussed when we come to that topic. Mention may also be made of the railway labor board which Congress established in 1920.

The federal trade commission.

Another board which exercises authority in the domain of commerce and industry is the federal trade commission established in 1914. This commission took over the work formerly handled by the bureau of corporations in the department of commerce, but it has acquired from Congress other authority in addition. It is empowered in a broad way to investigate and to prevent all unfair competition in commerce and industry, save among transportation companies and banks, both of which are under the supervision of other federal authorities.

The tariff commission.

Still more recently, in 1916, Congress authorized the establishment of a tariff commission with the duty of studying all questions relating to the importation of merchandise and providing data upon which the tariff can be framed with reference to the real economic needs of the country rather than in obedience to sectional or class or political pressure. The commission has, of course, no powers except those of an advisory nature. Congress retains full authority over the traffic schedules.

Nor does this complete the inventory of administrative agencies. The bureau of efficiency, established in 1917, has for its chief function to suggest improvements in the system and business methods of the various government offices in Washington. The Library of Congress, the largest repository of books in the country and one of the largest in the world, is not included in any of the regular departments, its librarian being responsible directly to the President. The government printing office is also a detached unit of administration, although there is no good reason why it should be.<sup>1</sup>

Other  
executive  
agencies.

Now while this administrative machinery may seem complicated and cumbrous, it is not more so than in the national governments of other great nations. The saving grace of the whole system is the fact that it revolves on a definite center—the executive supremacy of the President. There is no diffusion of administrative responsibility in the national government, such as so commonly exists in the government of American states and cities. The President is the apex of the executive pyramid. All administrative responsibility converges in his hands. So long as that remains true, so long as he appoints all heads of departments, chiefs of bureaus, and members of commissions, and so long as he may remove them at will, the elaboration of administrative machinery need bring no serious friction or working at cross purposes. If, however, Congress should ever succeed in limiting the right of the President to remove members of his cabinet and other executive officers, as it tried to do by the Tenure of Office Act in 1867, the system of centralized administrative responsibility would quickly break down. So long as the separation of powers remains a corner stone of American government the supremacy of the chief executive in all strictly administrative matters must be closely guarded or chaos in the business affairs of the nation will inevitably ensue.

The decentralization of administrative agencies.

While, however, the executive branch of the government is not directly responsible to Congress, and ought not to be, this does not mean that Congress can in no way influence the course of national administration. On the contrary it is Congress that authorizes the establishment of each depart-

Relation of  
national  
adminis-  
tration to  
Congress.

<sup>1</sup> Full information concerning the work of all the bureaus and boards can be found in the service monographs issued by the Institute of Government Research.

ment, bureau, or commission; it is Congress that gives each its functions; it is Congress that grants the money which enables every administrative agency to carry on its work. Congress can reorganize any department or even abolish it altogether, subject of course to the fact that it would probably have to override a presidential veto. Most important of all among congressional powers over the administration, however, is the authority to give or withhold appropriations. This, in the last analysis, is the weapon with which it can bring any administrative officer, and even the President, to terms. From the various departments, moreover, Congress can and does require reports and information; it can investigate any department at will, and in the last resort it has the power of impeachment.

Should  
members of  
the cabinet  
sit in  
Congress?

It has often been urged that a greater degree of harmony and coöperation between the executive and legislative branches of the national government would be secured if members of the cabinet were allowed to sit and speak (although not to vote) in both Houses of Congress. Congress has an undoubted right to give them this privilege under the provision of the constitution which authorizes both Houses to make their own rules of procedure. For a hundred years, moreover, delegates from the territories have been allowed to sit in the House of Representatives and to speak there, although having no right to vote. The constitution excludes any person "holding any office under the United States" from being "a member of either House during his continuance in office," but the head of a department, by taking a part in the deliberations of either House, would not become a member of it any more than the chaplain or the clerk. He would have no official term, no privilege of immunity from arrest, no vote, none of the constitutional attributes of a member.

Conceding, however, that Congress has the power to admit the members of the cabinet to its sessions, would it be expedient to do so? That question has been many times discussed, and there are undoubtedly two sides to it. On the one hand, it has been urged that Congress could, in this way, obtain more useful and more exact information than it now obtains through round-about channels; that the change would inspire the President to choose, as members of the cabinet, men of greater public experience, and that it would also compel these men to become proficient in the affairs of their several departments, for no in-

Merits and  
defects  
of the  
proposal.



capable head of a department could hope to influence the deliberations of Congress day by day. It would help supply both Houses with leadership, which is what they now conspicuously lack. It would bring team-play into the operations of government. On the other hand, it is replied that to place on the floor of each chamber ten cabinet secretaries of national prestige and long public experience would give the executive branch of the government a greatly increased influence over the making of laws and appropriations. The President would have, in both Houses, ten loyal defenders who would be both privileged and ready to use their forensic cudgels in his behalf. It is questionable whether the floor of Congress is the best place for open warfare between the executive and legislative branches of the government,—and pitched battles would surely be fought from time to time.

Members of the cabinet, moreover, have already too much to do in their several departments without daily attendance at congressional debates. Frequently they complain of the time required of them in appearing before congressional committees. Even as it is the members of the cabinet must turn over to their subordinates a great many important matters. If they had to spend much time in the legislative chambers they could hope to gain little or no personal familiarity with the affairs of their respective departments. It is not enough to say that the plan works well in England, for England is not America, nor are English administrative traditions anything like our own. There are serious defects in the English system, moreover, as all students of comparative government recognize. If Congress suffers from too little leadership, parliament suffers from too much.

A favorite theme of writers in the field of comparative government has been the series of contrasts between the cabinet system of England and that of the United States. The differences, of course, are wide and fundamental. It is hardly worth while to discuss them at length, for they are relatively easy to comprehend. Here are the chief discrepancies set down under three main heads:

The members of the English cabinet must be members of one or other branch of parliament; in the United States the members of the cabinet cannot be members of either House of Congress.

In England the cabinet is the "great standing committee of

English  
and  
American  
cabinets  
contrasted:

1. qualifi-  
cations of  
members.

2. powers  
of  
initiative  
in legisla-  
tion.

parliament," arranging all important business in advance, championing these measures on their way through both chambers, and assuming the function of legislative leadership. Englishmen are fond of writing about the cabinet's "strict responsibility to the House of Commons"; but the actual practice of English government gives quite as much warrant for a statement that the House of Commons is responsible to the cabinet.<sup>1</sup>

In the United States the cabinet may, in an informal way, help the President with proposed projects of legislation, but it can assume no formal responsibility and it can take no open share in facilitating the progress of legislation. The most important practical power of the English cabinet, that of forcing business through the legislative chambers, does not belong to the cabinet in America.

3. responsi-  
bility.

Finally, the English cabinet is by usage responsible to the House of Commons, while the cabinet of the United States is not responsible to Congress. An adverse vote in the House of Commons is sufficient to overthrow the cabinet in England; a hundred adverse votes in the Senate or the House of Representatives do not necessarily cause the members of the American cabinet to resign. Their responsibility is to the President alone. This is, after all, the most outstanding of all differences between the two cabinets. In England the executive power is ultimately dependent upon the will of the House of Commons; in America it is independent of Congress, supreme within its own sphere and accountable to the people alone.

Which plan is the better? That is a question which is not worth arguing. It is like engaging in a controversy upon the relative prowess of an elephant and a whale. Each is fitted to its own element and would make a ludicrous showing were it to change habitats. Both the English and American cabinet systems have served satisfactorily, each in its own political environment, and the adaptation of the agent to its environment is as essential in the body politic as in other organisms. If the American system shows its weakness in the defective coöperation which it provides between the two great arms of government, it has an offsetting merit in the protection which it affords against any undue gravitation of power into a few hands.

<sup>1</sup> See the discussion of this point in the author's *Governments of Europe*, (New York, 1925), Ch. iv.

## CHAPTER XI

### THE SENATE: ITS ORGANIZATION

This is a Senate, a Senate of equals, of men of individual honor and personal character, and of absolute independence.—*Daniel Webster*.

The Senate has been both extravagantly praised and unreasonably disparaged. . . . It is just what the mode of its election and the conditions of public life in this country make it.—*Woodrow Wilson*.

During the Revolutionary War and under the Articles of Confederation, the common affairs of the thirteen states were managed by a Congress which consisted of a single chamber. It was decided by the constitutional convention of 1787 at an early stage in its deliberations, however, that the new government should provide a Congress of two chambers. This decision was reached with practical unanimity, as it seemed unwise to give to a single chamber, particularly to one chosen by popular vote, the great legislative authority which it was proposed to vest in the new government. Such a single chamber might enact laws hastily, might be moved by gusts of prejudice, and might become in the end a legislative octopus. The bicameral system seemed to be indicated by the lessons of experience and by considerations of prudence, in view of the "propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions." Most of the colonies, moreover, had maintained two legislative chambers, likewise all of the new state constitutions except those of Pennsylvania, Georgia, and Vermont made provisions for the double-chamber system.

The bicameral system, in a word, was a concession to the desire for political stability. But there was another consideration, namely, the desirability of embodying, somewhere in the new government, the principle that all the states were equal. Without provision for two houses, the terms of the first great

Why the double-chamber system was first adopted.

compromise would not have been possible.<sup>1</sup> The adoption of the double-chamber system was settled before the dispute over the basis of representation became acute, but the compromise sealed the matter beyond the possibility of reopening it. In the second place, therefore, the bicameral system was a concession to the principle of state sovereignty and to its corollary, the equality of the states.

Both concessions were wise as events have proved. The Senate has given stability to the process of national lawmaking; it has ensured the consideration of measures from diverse points of view; it has provided the nation with a council of elder statesmen, most of whom have had much political experience, and it has helped to maintain intact the rights of the states under the constitution.<sup>2</sup> With only three or four exceptions every national legislature in the world is now made up of two chambers.<sup>3</sup>

The constitutional basis of representation in Congress.

The basis of representation in the Congress of the United States is this: there are two interests to be represented, namely, the people of the states and the people of the nation. The people of the states, as such, are equally represented—by each state having two senators in the upper branch of Congress, the Senate. The people of the nation, on the other hand, are represented by a varying number of representatives in the lower branch of Congress, the House of Representatives. But in both cases the unit of representation is the state. Representatives, like senators, are apportioned to states and not to congressional districts. Occasionally they are chosen by the voters of the whole state.<sup>4</sup> Congress, accordingly, is a double-chambered assembly of state envoys; its members are officers of the states from which they come, and not officers of the national government.

Reasons for the original method of choosing senators:

In the constitution, as originally adopted, it was provided that the Senate of the United States should be made up of two senators from each state, chosen by the legislature thereof for six years. In adopting this method of choosing the senators two purposes were in view. First, it was the intention that the Senate should be a sober-minded body, made up of men who had gained political experience and distinction in their own states—

<sup>1</sup> See *above*, p. 42.

<sup>2</sup> Approximately half the senators to-day (1924) are over sixty years of age. At least two-thirds of them are men of long experience in politics.

<sup>3</sup> The chief exceptions are Esthonia, Finland, and Jugo-Slavia.

<sup>4</sup> See *below*, p. 221.



men who might not possess the attributes of popularity but who would command respect by their personal attainments. The fear of demagogism, of rash legislation dictated by selfishness or ignorance, cropped out persistently in the deliberations of 1787. "A good government," wrote one of those who had much to do with the framing of the constitution, "implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert that in American governments too little attention has been paid to the last."<sup>1</sup>

Honesty and good intent, in other words, would not of themselves suffice as the basis of an enduring government. Precaution must be taken to make place in the national legislature for a small body of men who would be chosen because of their knowledge, judgment, and maturity—men who would be loyal to their own states but yet would "think continentally." Such men would, it was felt, be more readily chosen by the state legislatures, they having, as it was asserted, "more sense of character" than the people at large.

But there was a second reason for intrusting the selection of senators to the legislatures of the several states, namely, to insure the permanence of these legislatures themselves. The minds of the leaders harbored a fear lest the creation of a vigorous national government might be the first step towards the ultimate destruction of the new state governments. And not only the leaders, but the people, were afraid of this possibility. It was what had happened in earlier federations. So the framers of the constitution took a precaution against it. This they did by gearing an important wheel in the national machine directly to the mechanism of state government. They so arranged matters that the state legislatures could never be eliminated without bringing down one branch of Congress as well. For if there were no state legislatures there could be no senators. The Senate was thus to be a constitutional link binding together the two spheres of government, state and national. It was a hostage given to the states to insure the permanence of their legislatures.

The makers of the constitution had very clear ideas as to

<sup>1</sup> Alexander Hamilton in *The Federalist*, No. 62.

1. the desire for a mature and conservative element in Congress.

2. to guarantee the permanence of the state legislatures.

What the Senate was intended to be.

what they intended the Senate to be. It was to serve as a privy council and House of Lords combined, as a check-rein on certain powers of the President (in the matter of treaties and appointments), and a brake upon the rash ardor of the House. Senators were given the longest terms provided for any elective officers (six years), in order to minimize what Hamilton termed "the mischievous effects of a mutable or unstable government," to trace which, he declared, "would fill a volume." If Hamilton had been given his way, they would have been chosen for life. While his colleagues were not ready to go so far, they concurred in the opinion that one of the two legislative chambers should be so constituted as to protect the rights of property against the possible, and even probable, inroads of an aggressive and capricious majority among the people.<sup>1</sup>

It was Washington, according to a somewhat dubious tradition, who expressed the whole idea in a popular simile. Thomas Jefferson had misgivings about the need of a second chamber. He and Washington were having a friendly argument on the matter while the constitution was before the country for ratification. They were taking tea together, so the story goes, when Jefferson poured some of the tea from his cup into the saucer. "Why do you do that?" asked the Father of his Country. "To cool it, of course," replied Jefferson. "Ah, yes," retorted Washington, "and the Senate is to be the saucer into which the bills that come steaming hot from the House are to be poured for cooling."

The Senate an indigenous institution.

The Senate, as originally designed and established, is a purely American product. Some antiquarians have unearthed a precedent for it in the ancient confederation of Hellenic states "where each city, however different in wealth, strength, and other circumstances, had the same number of deputies and an equal voice in everything that related to the concerns of Greece." Others have found its prototype in both the United Netherlands and the Swiss Confederation. There is no need, however, to have gone seeking so far afield. The framers of the constitution were quite familiar with upper chambers in colonial times, some of which, like the governor's council in Massachusetts, were made

<sup>1</sup> So far as the records of the convention of 1787 disclose, James Wilson of Pennsylvania was the only delegate who urged the direct popular election of senators.

up of members chosen to represent districts, and all of which were intended to serve as checks upon the popular assemblies. Starting with this upper chamber of colonial days, the organization of the new Senate was merely adapted to the political exigencies of the time.

The reasons for giving the state legislatures the right to elect the senators were good reasons in 1787, and the method encountered very little objection for many years. For more than a century the legislatures did the choosing, as the constitution originally provided. Each state, in the first instance, was left to determine the procedure by which the choice should be made, whether by its two legislative chambers acting separately or in joint session. But controversies arose and these controversies sometimes prevented any choice being made at all. In 1866, therefore, Congress passed a law making the procedure uniform for all states. In brief, the provision was that the two branches of a state legislature should first ballot separately, but if they could not agree on the choice of a senator in that way, they were then to meet in joint session and keep balloting day after day until some one obtained a majority. If a vacancy in the senatorial representation from any state occurred at a time when the state legislature was not in session, the governor of the state was empowered by the constitution to name some qualified person to serve until the legislature could meet and make a choice, or should adjourn without making a choice.

Older plan  
of choosing  
senators  
described.

This uniform procedure was an improvement, but it did not quiet the growing demand that senators should be chosen by direct popular election, and not by the state legislatures. The agitation for direct election began as early as Andrew Jackson's era, but it did not make much progress until after the Civil War. Then it gained momentum from several sources. The country began to feel that there was too much "invisible government" in the selection of senators, too much spending of money, too much bossism. And there were reasons for this feeling. Far from always choosing men of ripe experience, legislatures allowed their choice of senators to be dictated by unworthy motives. Their action was never determined, indeed, by the whole legislature but by a party caucus of the majority members. Partisan service, without any other qualification, placed many senators in their seats. The dictation of political bosses counted for more

Objections  
to this  
plan.



with members of state legislatures than the promptings of their own judgment or the call of public opinion. The influence of great corporations was able, time and again, to decide the election. Even outright bribery was not unknown. Not that all senators, of course, or even most of them, were chosen from reprehensible motives or by crooked methods; the great majority of United States senators obtained their election in ways which were perfectly proper and beyond serious criticism. But departures from the paths of legislative rectitude were all too frequent, and they stamped upon the public mind the impression that indirect election inevitably meant intrigue, that it gave an unfair advantage to the candidate with large funds at his disposal, and that it was making the Senate a reactionary body. There were frequent deadlocks, too, ballot after ballot being taken daily for weeks' and even for months in some of the state legislatures without any one obtaining a clear majority. In this way a state was often deprived of its full representation in the Senate over considerable periods of time. And, finally, the whole arrangement had a bad influence upon the state legislatures themselves. They often got so hot over a senatorial election at the beginning of their session that for weeks thereafter they could not cool down to the prosaic work of making the state laws.

The movement for the direct popular election of senators.

At any rate, the popular antagonism grew apace, and projects for changing the constitution so as to permit direct election came to the front in the closing decades of the nineteenth century.<sup>1</sup> Several times the House of Representatives passed by the requisite two-thirds vote a proposition to submit such an amendment to the states for their approval, but the instinct of self-preservation led the Senate to refuse concurrence. Meanwhile, some of the states devised a plan by which they virtually secured the popular choice of their senators without waiting for a change in the constitutional machinery. The general features of this plan were as follows: whenever the term of a senator was about to expire a direct primary was held in which each political party chose its candidate to succeed him. Every aspirant for election to the state legislature was then asked by the voters to pledge their support to "the people's choice" at the primary. The legislators were, of course, under no legal obligation to keep

<sup>1</sup> George H. Haynes, *The Election of Senators* (New York, 1906).



such preëlection pledges, but in the main they did so. More than half the states, prior to 1913, had succeeded by one device or another, in having the people determine the election. In these states the legislatures were simply ratifying the popular choice; they were exercising no more discretion than is possessed by the presidential electors when they "elect" the President.

It seemed to be only a matter of time before this would be the situation in all the states. So the opponents of direct election gave way, and in 1913 the seventeenth amendment to the national constitution was finally adopted. It provides that senators shall be chosen directly by the voters of the several states, not by the legislatures. No longer was there any hesitation about snapping the ancient link between the state and national governments; the danger that federal usurpation would extinguish the state legislatures had long since passed away, if, indeed, it had ever had any real existence. To-day, therefore, the post of United States senator is elective, but the term and the qualifications of senators remain as before. A senator must be not less than thirty years of age, a citizen of at least nine years' standing, and at the time of his election an inhabitant of the state which he is to represent.

Culmination of this movement in the seventeenth amendment.

But while the term of senators, as has been said, is six years, one-third of the Senate's membership is renewed every two years. No state elects both its senators in the same year, unless some unexpected vacancy should occur in one of the senatorships. The choice is made by the voters at the regular state election, and the qualifications for voting are the same as those required at the election of representatives. When a vacancy occurs through the death, disqualification, or resignation of a senator from any state, the governor issues a writ for a special election, unless a regular polling day is near at hand; and the state legislature may empower the governor to appoint some qualified person as senator temporarily, to sit until this election or the next state election is held.

Great things were expected to result from this new method of selection, but great things have not resulted. The personnel of the Senate has not conspicuously improved since the seventeenth amendment went into operation; in some respects it has deteriorated. Its prestige has not risen; if anything, it has declined. There may be no more corruption now than there was

Its results.

prior to 1913, and no more "invisible" influence at work; but there is no reason to be sure that there is less of either. The ultimate effects of the new method cannot be fairly judged from a dozen years' experience but the eye can thus far discern no ground for predicting that they will be of any substantial benefit.

Equality of representation in the Senate must remain.

The seventeenth amendment made no change in the equal representation of the states, although, with the present great disparity of population among the various commonwealths, this feature has become a great anomaly. Nevada, with about 80,000 population, has two senators, while New York, with over 10,000,000, has the same number. Proportionally, New York would have two hundred senators. The population of Illinois is just about the same as that of all the New England states combined; but Illinois has two senators, while New England has twelve. Thus works the principle that states, like men, are created equal. But, anomalous or not, this equality of representation is an essential feature of a bargain made by the larger with the smaller states, and the constitution contains a pledge that no state (without its consent) shall ever be deprived of its equal suffrage in the Senate. This pledge is not legally binding, of course, for there is absolutely no way in which the ultimate sovereignty of the whole people can be restricted in this or any other matter. But the pledge embodies a moral obligation and it will be kept. From time to time somebody proposes that the Senate be reconstituted in some such way as would give it, roughly at least, a population basis. No such suggestion, for the practical reason just given, is worth discussing. It is a condition, not a theory, that confronts us. No matter how widely the states may vary in area, population, or resources, the principle of equal representation in the Senate must remain unless (as is hardly conceivable) the forty-eight states should unanimously agree to change it. A pity 'tis, perhaps, but without this provision there would have been no constitution.

Would it be wise to change it if we could?

It can be fairly argued, moreover, that even were a change in the basis of representation possible, such a change would be unwise. The Senate represents regions, not numbers; the House represents numbers. A majority of the House membership comes from ten states of the Union. Were it not for the Senate these ten states would control the legislative policy of the nation. But with the equality of representation in the Senate

it takes twenty-five states to control a majority. The Senate, as has been well said, reflects not merely the size, but the variety, the heterogeneous character, the range, and the breadth of these United States.

The Senate of the United States holds its regular sessions each year in its own chamber at the national capital. It may also be called by the President in special session, even when the House of Representatives is not sitting. This is because the Senate, as will be pointed out in the next chapter, has some special functions which are not shared by the other branch of Congress, the trial of impeachments, the confirmation of presidential appointments, and the approval of treaties, for example. By the terms of the constitution the Vice President of the United States is the Senate's presiding officer, and he possesses the customary powers and duties of that post. But he has no vote except in the case of a tie. This restriction was thought prudent in order that the state from which the Vice President happens to come would not regularly have three votes on all questions. In the earlier days of the Union, when the Senate was a small body of less than thirty members, tie-votes were not uncommon; but nowadays, with the membership increased to ninety-six, the Vice President rarely gets the opportunity to give a casting vote. In the absence of the Vice President the Senate elects a president pro tempore. It also chooses its other officers, sergeant-at-arms, chaplain, and clerks.

Organiza-  
tion of the  
Senate.

The Senate makes its own rules of procedure. On the whole its rules are simple, far more so than those of the House. They require that every bill or joint resolution shall receive three readings before being passed, but the first two readings are merely nominal and are given before the bill is referred to the appropriate committee. The real contest, if any, comes upon the occasion of the third reading, when amendments may be offered and voted upon. No general priority is given in the Senate, as in the House, to any class of measures, except that appropriation bills have a certain precedence. Debate in the Senate is not limited, as in the House; there is ordinarily no limit on the time that a senator may occupy, and no provision for bringing a debate to an end by moving the previous question. Since 1917, however, it has been possible for the Senate, by a two-thirds vote, to restrict each senator to one hour and

Its pro-  
cedure.



thus bring any debate to an end within a reasonable time.<sup>1</sup> The freedom of debate which is traditional in the Senate has had an important influence upon its work. Most of its meetings are public, but the Senate may vote at any time to go into "executive session" behind closed doors. This it often does when the ratification of treaties or the confirmation of appointments is under discussion.

Its committees.

Like all great legislative bodies, the Senate of the United States does a large part of its work through standing committees.<sup>2</sup> Some of them are important and have substantially the same designation and jurisdiction as the chief committees in the other chamber; but others have only perfunctory work to do and scarcely ever meet at all. The most important committees of the Senate are those on finance, appropriations, foreign relations, the judiciary, and interstate commerce. The first two have the consideration of all measures affecting revenue and expenditures respectively; the next two owe much of their importance to the fact that all the President's appointments to the diplomatic service and to the federal judgeships are referred to them. Likewise, the committee on foreign relations considers all treaties before they are discussed by the Senate as a whole. The committee on interstate commerce has the preliminary consideration of all measures relating to the supervision of railroads and other interstate utilities. Senate committees contain from three to seventeen members, and every senator is sure to be assigned to one or more of them. The Senate also meets in committee of the whole for the detailed consideration of measures.

How committees are chosen.

The selection of the various committees is made, at the beginning of each Congress, by special committees chosen for that purpose by the caucus of each party. These special "committees on committees" make up a slate or list of committee assignments, and this is ordinarily accepted by the two caucuses and then by the Senate without change. Invariably, of course, the majority party in the Senate is given a safe numerical margin

<sup>1</sup> Senate Rule, No. 22. The rule provides that any sixteen senators may file a petition to close the debate, and when the Senate votes by a two-thirds majority to do so, no dilatory motions are in order and no amendments save by unanimous consent. This rule causes the debate to be limited to as many hours as there are senators desiring to speak.

<sup>2</sup> Robert Luce, *Legislative Procedure* (Boston, 1922), Chaps. iv-viii.



on every committee of importance. Each committee has its chairman, who is named on the slate in the same way, but in the naming of these chairmen it is usual to respect the principle of seniority in service. Senators of the majority party who have had long service, especially on particular committees, are usually given the important chairmanships. Every committee has its "ranking member," the one who stands next in order of seniority and who is in line for promotion to the chairmanship when a vacancy occurs, provided his own party retains a majority in the Senate. Senators often stay on the same committees year after year and thus acquire a familiarity with their work. The Senate, it will be recalled, is a quasi-permanent body; not more than one-third of its members go out of office at any one time, so that there is never any need for a complete reorganization of its committees.

Mention should be made of one committee which is not provided for by the rules of the Senate but which is of prime importance nevertheless. This is the steering committee, so-called, which is supposed to be named by the caucus of majority senators, but which is virtually chosen by the majority leader whom the caucus selects. Its work is to determine what measures most urgently need to be passed, and then to "steer" these measures through the Senate.

The steering committee.

Mention has been made of the fact that in the Senate freedom of debate is unrestricted to an extent unknown in any other legislative body throughout the world. This freedom has some great advantages in that it encourages spirited and continued discussion; it gives a minority a fair chance to fight matters to a finish and to let the country know the facts. But so great a latitude in debate may be easily abused, and it sometimes has been abused. It has sometimes given a factious minority the opportunity to use dilatory tactics and to wear out the endurance of the majority by conducting a "filibuster," as it is called. When the Senate's session is drawing to its close, this often permits a relatively small minority to defeat any measure by resort to filibustering tactics, and many measures have perished in this way. Indeed it can fairly be said that legislation in the closing days of the Senate's session virtually requires unanimous consent. Everyone remembers, for example, the way in which "twelve wilful men" in a total mem-

Freedom of debate in the Senate, its merits and defects.

bership of ninety-six endeavored to prevent the arming of American merchant vessels for self-protection in the spring of 1917. It was this action which caused the Senate to alter its rules in the way indicated a moment ago.

Quality of  
the  
Senate's  
debates.

Notwithstanding the opportunity for long speeches, the Senate's debates do not nowadays, in general, reach the high standards of bygone days, the days of Webster, Clay, Calhoun, Hayne, Benton, Douglas, Seward, and Sumner. Speeches of sterling quality and rhetorical excellence are still delivered when some matter of special importance or solemnity gives the occasion; but no senator nowadays sets out to convert his colleagues by eloquence. Speeches in the Senate are addressed to the country rather than to immediate hearers. By the way, it is not the practice of the Senate, as it is of the House, to give members "leave to print" speeches which they have not delivered or "leave to extend" a few remarks into many pages of the printed record.

Comparison  
with other  
countries.

Yet the standards of debate in the United States Senate are not below those of the British House of Commons, and they are certainly above those of legislative bodies in other lands. Legislative eloquence has suffered an eclipse—not merely in this country but everywhere. Party lines have tightened, so that only the authorized spokesmen of the party are now listened to with much interest; the others merely repeat, expound, and amplify. We are in a busy age; people will not read long speeches; they are content to take their impressions from the newspaper headlines. Time was when important speeches in the Senate were reported by the newspapers verbatim; to-day a senator feels himself honored if his speech receives a fifty-line summary.

Influence  
of the  
party  
spirit.

The party whip cracks frequently in the Senate as in other legislative chambers. Its custodian is the caucus. Each party, majority and minority, has its own caucus, made up solely of its own members, and at these meetings the action of each group is decided upon. The majority senators, whether Republicans or Democrats, agree as to the measures which they will support; the minority members, on the other hand, map out their counter-operations, deciding whether to oppose, or to offer amendments, or to filibuster, or to let measures go through. Only the majority party, however, uses the caucus regularly.

The caucus  
system in  
the Senate.

Every senator who attends his party caucus is bound to abide by any decision which the caucus may make, bound by a merely moral obligation, to be sure, but that is enough for all practical purposes. Thus it comes to pass that when a majority caucus has pledged its members to support any measure, the ultimate issue is virtually sealed. The majority, being pledged by caucus resolution to stand together, can insure its enactment.

In the Senate, as in the House, vigorous protests against the caucus system have been voiced from time to time, and there is throughout the country a good deal of prejudice against caucus legislation; but the system provides the only way in which responsibility for legislation, under a system of divided powers and partisan government, can be adequately centralized. When a majority caucus pledges its members, this means that the party is ready to take the entire responsibility for some action. The proposal then becomes what in England would be termed a "government measure." Reformers are continually urging that the Senate should replace "irresponsible party action in a secret conclave" by some form of "public, personal, and individual responsibility"; but the whole history of representative lawmaking proves that no well-ordered legislative programme is ever carried through by placing undue emphasis upon the duty of every legislator to be his own leader. The legislative caucus, or something akin to it, exists in all countries having systems of free government. It is not, as some imagine, a vicious affair which the politicians of America have devised for their own benefit.

Merits and defects of the caucus.

The Senate has the usual rights of a legislative body, and its members enjoy the customary immunities. They are privileged from arrest on civil process during their attendance, or in going to, or in returning from, the sessions. For what a senator may say in the course of a debate, moreover, the constitution provides that he "shall not be questioned in any other place"; in other words, he is not subject to the ordinary law of libel as administered by the courts. But the Senate itself can punish a member for disorderly conduct and by a two-thirds vote may even expel him. It may compel the attendance of absent senators, may conduct investigations, may summon witnesses, and, in the event of their refusal to appear or to answer questions,

Privileges and immunities of senators.

may cite them to the courts to be punished for contempt. It has the right to determine the qualifications of its own members. It may do more than merely examine into these formal qualifications, for it may investigate the question whether any senator has been properly chosen, whether bribery or other reprehensible means have been employed to influence his election. It has the power to unseat a senator if it finds that he has been elected by wrongful means. A senator is not, however, a "civil officer of the United States," as defined by the constitution, and hence may not be impeached before the Senate itself.<sup>1</sup>

The place  
of the  
Senate in  
American  
political  
history.

In political influence and prestige the Senate remained, for a time after its establishment, quite inferior to the House. The latter took the initiative in legislation of all kinds, while the Senate devoted more time to revising the measures which came up from the lower chamber than in originating bills of its own. It was a small body, regarded by the public as a private conference of provincial notables in which there was no opportunity for the exercise of brilliant political talents.<sup>2</sup> There was a common impression that senators had little individual discretion and merely followed the wishes of their own state legislatures. In the original Senate chamber (now occupied by the Supreme Court) there were no seats installed for the public, and what went on in this chamber attracted very little public attention. Madison, on one occasion, remarked that being desirous of increasing his reputation as a statesman, he could not afford to accept a seat in the Senate. The centre of political gravity during this period, which extended from 1789 to about 1830, was lodged in the House.

(a) from  
1789 to  
1830.

(b) from  
1830 to  
1870.

But during the time of Andrew Jackson this situation began to undergo a change. The abolition of the congressional nominating caucus, which the House through sheer weight of numbers always controlled, reduced the influence of that body.<sup>3</sup> The Senate began to come into its own. Men of great power and prestige entered its membership during the era which intervened between the inauguration of Jackson and the Civil War. The outstanding political questions of this epoch were connected

<sup>1</sup> See *below*, p. 209.

<sup>2</sup> Henry Jones Ford, *The Rise and Growth of American Politics* (N. Y., 1911), pp. 260-261.

<sup>3</sup> Cf. *below*, p. 376.



with the issue of state rights, and the Senate, as the chamber representing the interests of the several states, became the great forum of discussion. Controversies and compromises relating to the admission of new states centred about the ultimate control of the Senate by the pro-slavery or anti-slavery sections of the Union. The permanence of its organization, the longer terms for which its members were chosen, its smaller and more wieldy size, the reputation for skill and eloquence in debate which it developed—these things helped to turn the Senate into an arena in which the great national issues of the pre-war period were fought out. Both at home and abroad the Senate gained a name for talent, dignity, and aggressiveness. So quickly and so completely was the balance of power shifted from the lower to the upper chamber that a distinguished French student of American democracy, writing in the middle thirties, was impressed by the wide discrepancy between the two.<sup>1</sup> The great debates which preceded the War of 1812 took place in the House; but the combats of oratory which preceded the Civil War were fought in the Senate. Its zenith of power was reached after the close of the Civil War when it sought to usurp President Johnson's authority and even to oust him from office. No upper chamber in any other country matched the Senate of the United States in influence and power at that time.

Then came the inevitable reaction. By its undue emphasis upon "senatorial courtesy" and by its disposition to hamper the hands of the executive in foreign affairs the Senate overreached itself. Grant and Garfield each took a hand in clipping its wings, the former by rebuffing its claim to any control over removals from office; the latter by defying its rule of courtesy. Questions of economic policy, moreover, now came to the front, and in its handling of these the sectional spirit of the upper chamber cropped out too plainly. The growth of huge corpora-

(a) since 1870.

<sup>1</sup> "On entering the House of Representatives at Washington, one is struck by the vulgar demeanor of that great assembly. Often there is not a distinguished man in the whole number. Its members are almost all obscure individuals. . . . At a few yards distance is the door of the Senate, which contains within small space a large proportion of the celebrated men of America. Scarcely an individual is to be seen in it who has not had an active and illustrious career; the Senate is composed of eloquent advocates, distinguished generals, wise magistrates, and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe."—ALEXIS DE TOCQUEVILLE, *Democracy in America* (2 vols., London, 1835-1840), I, ch. xiii.

tions and of great fortunes brought new elements into its membership, senators who owed their selection either to personal wealth or to the fact that they were well backed from opulent sources. The ranks of those who owed their seats to intellectual eminence or long political experience grew thinner as the years went by. The Senate began to stamp itself upon the public imagination as the stronghold of vested economic interests and the foe of popular rights.

Present  
influence  
of the  
Senate.

Within the past decade the Senate has displayed a marked recrudescence in power, though not in its standards of personnel. Its victory over President Wilson on the League of Nations issue was one of far-reaching significance and consequences. During the short term of Mr. Harding's presidency its strength was notable; it became once more the "overpowering Senate." And so it continues today. Whether it will so remain is impossible to predict. Since it is a sharer in the executive power it naturally becomes stronger when a weak-willed President occupies the White House, and the converse is also true. There has never been a time, however, and probably never will be, when students of government can look upon the Senate of the United States as a second chamber of the usual type. Among second chambers in all the countries of the world it is by far the most powerful.<sup>1</sup>

<sup>1</sup>Two books on the Senate are C. H. Kerr, *The United States Senate* (N. Y., 1895) and Henry Cabot Lodge, *The Senate of the United States* (N. Y., 1921). The title of the latter is misleading, for only the first chapter has anything to do with the Senate.

## CHAPTER XII

### THE SENATE: ITS FUNCTIONS

There will always be thirty-four per cent of the Senate on the blackguard side of every question. A treaty entering the Senate is like a bull going into the arena.—*John Hay*.

"All legislative powers herein granted," declares the first article of the American constitution, "shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." It is significant that the Senate precedes the House in this article. The Senate was designed to be more than a branch of Congress. It was intended to serve as an executive council as well. If the framers of the constitution made no regular provision for any institution like the English privy council, it was because they felt that they had assigned to the Senate the most important things upon which it was desirable that the President should have advice and consent. Washington, when he became President, fully expected that the Senate would act as an advisory council, and sought to have it deliberate with him on treaties. The Senate at this time had only twenty-eight members, and hence was not too large for confidential discussion. But the senators did not relish the idea of having the President with them in executive session; they felt that it was a restraint upon free discussion. The President, likewise, found it embarrassing to sit there listening to the senatorial controversies. So the method of personal conferences with the Senate gave way to that of sending all business to it in formal written communications. Thereupon the Senate ceased to be anything like a privy council. It became a *consenting* rather than an *advising* body.

The constitution provides that appointments made by the President shall be subject to the "advice and consent" of the Senate. The appointing power is one of the greatest powers that an executive can have, too great, it was felt, to be vested in the

The Senate an executive as well as a legislative body.

Special  
functions  
of the  
Senate:  
(1) the  
confirma-  
tion to ap-  
pointments.

President alone. For an unscrupulous President might use it to perpetuate himself in office. He might fill all the administrative positions in the national government with men whose appointments were dictated, as Hamilton said, by "stale prejudice, family connection, personal attachment, or desire for popularity." So the Senate was given a share in this authority. The initiative in making an appointment belongs to the President; but it does not become valid until the Senate concurs. This is the procedure in making presidential appointments: When the President has occasion to fill any office he sends a nomination to the Senate, and this nomination, after being announced, is referred to the appropriate committee. If it be the nomination of a federal judge, it goes to the judiciary committee; if that of an ambassador, to the committee on foreign relations. These committees may, and often do, assign such presidential nominations to special sub-committees for investigation as to the qualifications of the person nominated. If there are objections to the nominee, the committee or sub-committee hears such objections, and in due course a report, favorable or unfavorable, is made to the whole Senate. Then comes the vote to consent or to refuse consent. The Senate is not bound, of course, to follow the recommendations of its committees on such matters; but it does so except in unusual cases. If consent is refused, the same nomination may be submitted a second time, but this is not commonly done.

Rejections have not been uncommon, and they have at times developed considerable bitterness, but the vast majority of presidential nominations are confirmed with little or no hesitation. Much depends, of course, upon whether the Senate contains a majority representing the same political party as the President, and the general temper of the Senate with reference to appointments has changed from time to time. It is now pretty well conceded, however, that the responsibility for making the original selections ought to rest upon the President's shoulders, and that the Senate should not impair this responsibility by insisting upon a share of the initiative. It should, and does, content itself with taking action after the President has done his part. Bear in mind, also, that only the more important appointments require any action from the Senate. The vast majority of federal positions are now filled, under the civil serv-



ice regulations, by the President alone or by the heads of departments.

What happens if a post becomes vacant and the President desires to fill it when the Senate is not in session? In that case the President may make what is known as a "recess appointment." The person so appointed assumes office at once and holds it until the Senate has an opportunity to confirm him as the regular incumbent. If, however, the Senate declines to confirm him, he ceases to hold the office whenever the Senate's session comes to an end. But the President can bestow another recess appointment upon the same individual if he chooses to do so. It has occasionally happened that by a succession of these recess appointments an office has been kept occupied, despite the non-concurrence of the Senate, for several years.

Recess  
appoint-  
ments.

The second executive power shared by the Senate is that of approving treaties.<sup>1</sup> In dealing with this matter the framers of the constitution found themselves in a dilemma. If they gave the President sole power to make treaties, they would endow him with the absolute control of foreign affairs including the power to enter into secret military alliances, and they were not prepared to concentrate such dangerous authority in any man's hand. On the other hand, it was realized that "perfect secrecy and immediate despatch" are sometimes requisite in the making of treaties.<sup>2</sup> And these requisites, it was easy to see, could not be had if the President were forced to submit his negotiations, step by step, to a body of twenty-six men representing thirteen jealous states. In the end it was decided to adopt what seemed to be the less dangerous of the two alternatives and to stipulate that the President should make treaties "with the advice and consent of the Senate, provided two-thirds of the senators concur."

(2) the  
approval  
of treaties.

In treaty negotiations, as in the selection of persons for appointment to office, the Senate's advice is not asked in any formal way, although on some occasions the President has sounded the Senate before actively beginning treaty negotiations.<sup>3</sup> In

How the  
President  
and the  
senators  
share this  
power.

<sup>1</sup> S. B. Crandall, *Treaties, Their Making and Enforcement*, (2d ed., Washington, 1916). C. H. Butler, *The Treaty Making Power of the United States* (N. Y., 1902), and Ralston Hayden, *The Senate and Treaties* (N. Y., 1920).

<sup>2</sup> *The Federalist*, No. 64.

<sup>3</sup> President Polk, for example, asked the advice of the Senate with reference to the proposed Oregon boundary treaty in 1846.

any event a President rarely goes ahead and definitely concludes the terms of an important treaty without making sure of his ground. He is likely to keep in touch with the leaders of the Senate, especially with the chairman of its committee on foreign relations, and thus to ascertain in advance what the action of the Senate is likely to be in case a treaty of a certain type is laid before it. No President likes to carry treaty negotiations to a conclusion, only to have the Senate reject his work. When it is borne in mind, moreover, that two-thirds of the senators must give assent, there is an obvious difficulty in securing this approval under almost any circumstances. The Senate has always been very jealous of its share in the treaty-making power. On no point is its ire so easily aroused. It behooves the President, therefore, to take the Senate leaders frankly into his confidence while the treaty negotiations are proceeding. Unless he does so he is likely to find a still-born treaty on his hands. Several Presidents have had to learn this lesson by bitter experience. President Wilson was by no means the first among them.<sup>1</sup>

The negotiations which precede the signing of a treaty are conducted on behalf of the United States by the department of state. This may be done either at Washington or at a foreign capital, the American ambassador or minister acting as intermediary in the latter case. After the general provisions have been informally agreed upon, the formal document is prepared and signed by diplomatic representatives of the countries concerned. At this stage the treaty goes to the Senate for approval. The Senate refers the matter to its committee on foreign relations which may hold hearings and listen to all the objections that may be raised from any source. Then the committee recommends that the treaty be approved, or rejected, and the Senate usually follows this recommendation. If approval is given, the treaty is formally ratified and goes into force, but if the Senate's approval is refused, the whole proceeding comes to naught.

Is every international agreement, of whatever sort, a treaty? And must every such agreement go to the Senate for ratification? The answer is No. International agreements which relate to routine matters, such as postal rates for example, are not re-

<sup>1</sup> The Senate rejected important treaties submitted to it by Pierce, Grant, Cleveland, Taft, and Roosevelt.

The way a treaty is made.

Evading senatorial ratification.

garded as treaties, nor are agreements which adjust the pecuniary claims of individual citizens against foreign governments. These are called "executive agreements" and do not go to the Senate. But the line between a treaty and an executive agreement is not absolutely clear, and the attempt has sometimes been made to circumvent the Senate's opposition by resort to executive agreements in place of treaties. President Roosevelt in 1905, for example, made an executive agreement with Santo Domingo incorporating almost exactly the same provisions as a treaty which the Senate had refused to approve. President Wilson in 1917 authorized the making of an agreement with Japan which dealt with matters that ordinarily would be covered by a formal treaty. These were dangerous precedents and may fairly be regarded as contravening the spirit of the constitution.

A treaty, when duly approved and ratified, becomes, like the constitution, the supreme law of the land, "and the judges in every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." No state may make a treaty of any sort, nor may it enforce any law which contravenes the terms of a treaty made by the national government. The national government, moreover, may conclude treaties covering matters on which Congress would have no right to pass laws. The right of foreign citizens to acquire and hold property in the United States, for example, is a proper subject of a treaty provision, although the regulation of land-holding in any state does not come within the legislative jurisdiction of Congress.<sup>1</sup>

Legal  
status  
of a treaty.

A treaty may be abrogated by mutual consent or by the making of a new treaty.<sup>2</sup> It may also be abrogated by passing an act of Congress which is inconsistent with the terms of the treaty. Acts of Congress and treaties stand upon the same level. Whichever comes last is paramount in case of conflict. A treaty may thus be used to modify an act of Congress and certain provisions of the Volstead Act, as interpreted by the Supreme Court, have recently been modified by a treaty with Great Britain.

<sup>1</sup> Congress, for example, could not, by passing a law, give Japanese the right to own land in California. But the President and the Senate, by making a treaty with Japan, could do this if they should so desire.

<sup>2</sup> A treaty may also be "denounced," or arbitrarily terminated by one of the parties, without the consent of the other; but the ethics of such action are not beyond doubt.

The  
Senate's  
power to  
amend a  
treaty.

May the Senate amend a treaty before ratifying it? It may, and very often has done so.<sup>1</sup> In that event, however, the negotiations with the other country must be reopened in order that its consent to the amendments may be obtained. But it sometimes happens that the Senate's amendments are so drastic as to preclude any hope of getting this consent. Not only may the Senate amend a treaty, but it may by resolution, either of itself or jointly with the House of Representatives, request the President to open negotiations on any matter with a foreign power. The President is under no legal obligation to comply. On the other hand the President may recall a treaty from the Senate after he has submitted it and may decline to promulgate it even after the Senate has voted approval. This, of course, he would do if conditions had changed in the interval or if his own attitude had undergone a change.

Relation  
of the  
House to  
treaties.

Strictly speaking, the House of Representatives has nothing to do with treaties, but occasions may arise in which action on its part is virtually necessary to give a treaty effect. No money can be appropriated for any purpose, no laws passed, no changes made in the tariff, for example, without action on the part of the House. Treaties sometimes provide that money will be paid, or that reciprocity in tariff matters will be granted by the United States. The treaty with Russia whereby the United States purchased Alaska in 1867 is an example; likewise the treaty with Spain in 1898, which provided for the payment of twenty million dollars in connection with the transfer of the Philippine Islands. What if the House of Representatives had refused to join in appropriating the money stipulated in the terms of these treaties? That is a very old constitutional question, for it was raised and discussed in connection with the Louisiana Purchase of 1803, and it has been debated several times since, but it is still an unanswered question because the House has, thus far, never failed to do its part. The House has on more than one occasion asserted its right to refuse, but it has made no actual refusal. The best legal opinion inclines to the view that while the refusal of the House to do its part in carrying out the provisions of a treaty might place the nation in an awkward predicament

<sup>1</sup> Several hundred treaties have gone to the Senate during the past hundred and thirty-seven years. Of these the Senate has rejected less than twenty. But it amended about eighty of them.



ment, the House would be quite within its constitutional rights if it should choose to take that stand.

It is often said that treaty-making arrangements such as exist in the United States would be intolerable in any European land. In England treaties are made by the secretary of state for foreign affairs without the necessity of submitting them to anybody outside the cabinet. In the various countries of Continental Europe certain treaties must be submitted to the legislative chambers, but not the ones which require secrecy. Military alliances and other far-reaching international agreements have been made by the chief executive alone. The people have never been consulted; their direct representatives have rarely been asked for advice; in some cases they have not even been informed of military alliances already made. Bismarck, the iron chancellor of the German Empire, once spoke of public opinion as "the great enemy of efficient diplomacy." It was an absurdity, he thought, to let the public know what the diplomats were doing. If that be true, American diplomacy can never be very efficient, for public opinion must always be a controlling factor in it. But American diplomacy will at least be frank, consistent, and honest—which European diplomacy has not always been. Secret diplomacy is not yet a thing of the past in Europe, but it ought to be, for there is little to be said in defence of it. The men of 1787 were wise and far-visioned when they set up a barrier against anything of the sort, so far as America is concerned. At times, no doubt, the requirement that treaties must go before the Senate has been a stumbling block. It has occasionally prevented the President from making a good bargain. It has sometimes compelled him to enter negotiations with one hand tied behind his back. Secretaries of state have fumed and fussed about it at intervals—as John Hay did in the remark that stands at the head of this chapter. But it has been on the whole a salutary provision. It has held rash Presidents in bounds. It has kept the nation on its course for a long period of years without a single entangling alliance. Since the constitution went into force the United States has never concluded a single secret treaty of any sort. No other great country can say the same.

The Senate, as the constitution declares, has "the sole power to try all impeachments." Several important questions arise

The  
treaty-  
making  
power and  
secret  
diplomacy.

(3) the power to try impeachments.

with respect to the scope and incidents of this impeachment power. How did this process of impeachment originate? Why did the framers of the constitution establish it in the United States? Who may be impeached, for what offences, and what are the penalties in the event of conviction? Does the procedure in impeachments differ from that of an ordinary trial by jury? Can a pardon be granted after conviction? And to what extent has the impeaching power been used in the national government of this country?<sup>1</sup>

Its origin.

The impeachment is of English origin. It dates back into mediæval times, and for many centuries before the development of cabinet responsibility it afforded the only means whereby any minister of the crown could be brought to account by the House of Commons. The Commons preferred the charges; the House of Lords heard the evidence and gave its decision. Many high executive officials who used their power oppressively were brought up with a sharp turn in this way. An impeachment, however, should be clearly distinguished from the enactment of a "bill of attainder," which was a way of condemning men to death by ordinary legislative process, without formulating any definite charges or giving them any form of trial. Bills of attainder are prohibited by the constitution of the United States, and they have long since become obsolete in England. The impeachment procedure, on the other hand, commended itself to the pioneers of the American political system as a necessary safeguard against the exercise of arbitrary power. They found difficulty, however, in determining just how the English impeachment system could best be adapted to the needs of a purely representative government. "A well-constituted court for the trial of impeachments," declared Hamilton, "is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated *political*, as they relate chiefly to injuries done to the society itself. The prosecution of them, for this reason, will

<sup>1</sup> See Alexander Simpson, Jr., *A Treatise on Federal Impeachments* (Philadelphia, 1916). A good summary is also given in Roger Foster's *Commentaries on the Constitution of the United States* (Boston, 1895), pp. 505-632.

seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. . . . In such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."<sup>1</sup>

For this reason it was suggested that the impeachment power should be given to the Supreme Court, or to the Supreme Court and the Senate sitting together. But there were great practical objections to both these alternatives. Would it be wise, for example, to leave the duty of passing judgment upon the President to judges whom he had himself appointed? So the convention decided to follow the traditional English practice of allowing the lower House to prefer the charges and the upper House to determine them. Its members were well aware that this was by no means an ideal arrangement. But if mankind, as one of the delegates sagaciously expressed it, "were to agree upon no institution of government until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert."

Who may be impeached? Only the "President, Vice-President, and all civil officers of the United States." The list of civil officers includes ambassadors, members of the cabinet, judges of all federal courts, even postmasters; but it does not include members of either branch of Congress, nor, of course, officials of the several states. Members of the Senate and the House may be expelled by a two-thirds vote of their respective chambers, but not impeached. They are not civil officers of the United States.<sup>2</sup> This was decided by the Senate in the famous Blount case (1797). Senators and representatives are responsible to the states and to the people of the states. As such they may be impeached in their own states under such regulations as are provided in the state constitutions.

May a civil officer of the United States be impeached for an offence committed while holding office even though he is no

Who may  
be  
impeached?

<sup>1</sup> *The Federalist*, No. 65.

<sup>2</sup> Notice, in corroboration of this, the wording of another clause in the constitution (Article I, section vi), which provides that "no senator or representative shall, during the time for which he was elected, be appointed to *any civil office*."

longer in office when the impeachment proceedings begin? <sup>1</sup> That was one of the points raised in the Belknap case (1876). Belknap was secretary of war during Grant's second administration. He was charged with having received money from the profits of trade at one of the Indian posts under his jurisdiction. When the charge was made public, impeachment proceedings were begun in the House and Belknap tried to escape arraignment by resigning. President Grant accepted the resignation but the Senate voted by a majority to proceed with the impeachment, which it did. For lack of the requisite two-thirds majority, however, Belknap was not convicted. So the question cannot be looked upon as having been decisively settled.

For what offences?

The constitution sets forth the offences for which a civil officer may be impeached; but it does not do this with absolute clarity. The grounds for impeachment, as therein stated, are "treason, bribery or other high crimes and misdemeanors." The first two words of this clause are definite enough, but the remaining part of it is ambiguous and has given rise to some difference of opinion. In general, however, it is now understood that civil officials are not to be impeached except for grave misconduct or malfeasance in office. General inefficiency, or bad judgment, or the abuse of an official's discretionary authority are not grounds for impeachment.

The penalties.

When an officer is convicted by the Senate he cannot be punished to any further extent than removal from office and disqualification from ever holding a federal position again. He cannot be put to death, imprisoned, or fined. But conviction upon impeachment does not prevent additional proceedings against a civil officer in the ordinary courts of the land if he has committed an indictable offence. A two-thirds vote of the Senate is necessary in all cases for conviction, and no pardon from any human source is possible in the case of one convicted on impeachment.

The procedure.

The procedure in impeachments may be briefly outlined. First, the accusation is made by some member of the House of Representatives from the floor of that body. A committee of the House is then appointed to investigate the charges. If

<sup>1</sup> For an argument that such officers are not liable to impeachment, see Joseph Story, *Commentaries on the Constitution of the United States* (2 vols. Boston, 1833), Sec. 801.



it finds that an impeachment should be proceeded with, the committee so reports to the House and the latter may vote to accept this recommendation. In this case the articles of impeachment are sent to the Senate. The Senate has no discretion as to whether it will accept these articles or not. It merely sets a date for the trial and furnishes the accused official with a copy of the charges preferred against him. In hearing an impeachment the Senate sits as a court, the senators being "placed on oath or affirmation," before the proceedings begin. The Vice-President of the United States presides over the Senate on this as on other occasions but when the articles of impeachment are directed against the President, the Chief Justice of the Supreme Court presides. This provision is made for an obvious reason. The Vice President would not be an appropriate presiding officer when the outcome of the trial might determine his own promotion to the presidency. In impeachments the usual rules of evidence are observed: the accused official is allowed to be heard in his own defence, he may summon witnesses, and have his own counsel. The proceedings are public until the senators begin to vote upon a verdict. Then the Senate goes behind closed doors like a jury.

There have been nine federal impeachments in all, but only two of them have come within the last forty years. Only three have resulted in convictions.<sup>1</sup> The most notable cases were those of William Blount, senator from Tennessee, in 1797, Andrew Johnson, President of the United States, in 1868, and William W. Belknap, Secretary of War, in 1876, all of whom were acquitted. Senator Blount was charged with having a part in a conspiracy to stir up troubles in the Floridas and Louisiana, which at that time belonged to Spain. The Senate, after receiving the charges, expelled him from its membership, but refused to convict him on impeachment, holding that he was not a "civil officer of the United States." Secretary Belknap, as has already been said, was charged with the acceptance of money

Famous  
impeach-  
ments.

Blount.

Belknap.

<sup>1</sup> The first conviction was that of John Pickering, a federal district judge, who was charged in 1803 with "drunkenness and profanity on the bench." He was probably insane. The second case was that of another district judge, West H. Humphreys, who was charged in 1862 with having "engaged in rebellion against the United States," he having thrown in his lot with the Confederacy without resigning his judgeship. The third case was that of Judge Archbold of the Commerce Court, charged in 1913 with having accepted "presents" from suitors in his court.

from a trader whom he had appointed to an Indian post.

Johnson.

Finally, the Johnson case. The charges against President Andrew Johnson in 1868 were eleven in all, most of them having to do with reputed violations of the Tenure of Office Act which Congress had passed over the President's veto in 1867. The trial was conducted in an atmosphere of intense personal and factional bitterness. At its conclusion the Senate voted thirty-five to nineteen for conviction, which was only one vote short of the required two-thirds. It was a close call. In the autumn after Johnson's acquittal the next presidential election took place, and the accession of Grant put an end to the strained relations which had existed between the executive and legislative branches of national government. The most recent instance of a federal impeachment occurred in 1913 when a judge of the short-lived federal commerce court was convicted and removed.

A last resort.

An impeachment is at best a cumbrous and costly proceeding. It is not a method to be used if there is any simpler way of securing an officer's dismissal. But in the case of judges, or of executive officers whom the President may decline to dismiss, it is the only effective way of forcing anyone out of office. Threats of impeachment are made from time to time when members of the cabinet or other high officials become unpopular with congressmen, but most of these threats are intended for their moral effect only. Impeachment is a procedure that should not be called into use except as a last resort.

The authority of the Senate in legislation.

The three special functions of the Senate,—confirmation of appointments, approval of treaties, and the trial of impeachments,—have combined to give it dignity, prestige and power. But in addition to these special prerogatives the Senate has a large range of authority as a regular branch of Congress. It shares with the House of Representatives the function of making the federal laws. With one important exception its legislative authority is co-equal with that of the House. This exception relates to measures for raising the revenues, all of which, by the terms of the constitution, must "originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." This giving of special privileges to the House in the matter of revenue bills was suggested by English parliamentary practice and it was demanded by the larger states in 1787. But in practice the limitation on the Senate's

Money bills.

right to "originate" revenue bills has not proved to be of any importance, for the Senate can virtually initiate new revenue proposals under the guise of amendments. In 1883, for example, the House originated and sent to the Senate a new tariff—and a tariff is a revenue measure if anything is. The Senate, by amendment, struck out everything in the bill except the enacting clause.<sup>1</sup> Then it inserted a wholly new tariff of its own and sent the measure back to the House "as amended." The House grumbled for a while over this evasion of its own special privilege; but in the end it accepted the tariff which the Senate had virtually originated.<sup>2</sup> On many other occasions the Senate has "originated" revenue measures in fact, if not in form. So it is doing what the constitution tried to inhibit it from doing.

On the other hand, the constitution gives the House no exclusive power to originate "expenditure" bills, or appropriation bills as they are called. Yet this power the House has assumed and guards with great jealousy. The Senate occasionally originates a measure containing an appropriation of money for a single purpose; but the annual budget, and all general appropriation measures originate in the House. The Senate is content with its unlimited right of amendment, which it uses with a free hand.

In all other matters the powers of the two chambers, both by the constitution and by usage, are equal in scope. No bill can become a law without the Senate's approval. At various times and on various matters one chamber or the other may have the greater amount of legislative influence because of its better organization or stronger hold upon public opinion. Senator Lodge makes the assertion that the Senate, taking its legislative history as a whole, has originated more important legislation than the House, and this is probably true.

If the two chambers fail to agree on any measure, one or the other must give way, or a compromise must be arranged by both giving way in part. This is effected by means of a conference committee, representing both chambers, and usually made up of three members from each. In these compromises

Legislative powers of the Senate and the House are substantially co-ordinate.

Disagreements between the two chambers—how settled.

<sup>1</sup> This is the introductory clause which stands at the head of every measure: "Be it enacted by the Congress of the United States."

<sup>2</sup> In 1909, when the House tariff came back from the Senate there were 847 amendments clinging to it. Henry Cabot Lodge, *The Senate of the United States* (N. Y., 1921), p. 9.

the Senate has a reputation for getting the better of the bargain. And this is not surprising, for the Senate is usually represented on conference committees by stronger personalities, men of greater skill in bargaining. As a rule, moreover, it gives its conferees a firmer degree of support. Senators, too, are more experienced legislators, on the average, than are the members of the House. Many of them have served terms in the lower chamber before being chosen to the Senate and have thereby acquired proficiency in all the subtleties of legislative practice. The older senators, who guide the upper chamber in its work, regard themselves as experts in the science of lawmaking, whereas many members of the House are mere neophytes in statesmanship. They are legislative birds of passage, as it were. Even upon the President, as Woodrow Wilson once remarked, the older members of the Senate look with "unmistakable condescension." But if the Senate has been at many times an "overpowering" body, it is not because the constitution, laws, or usages of the land have made it so, but because it is a more compact body than the House, better organized, composed of older and more practiced members, more amenable to leadership, and less subject to fluctuations of opinion.



## CHAPTER XIII

### THE HOUSE OF REPRESENTATIVES: ITS COMPOSITION

Any government is free where the laws rule, and the people are a party to those laws.—*William Penn.*

Like a great forest which has grown to maturity, and in which all the trees are of about the same size, the Congress of the United States is hard to view appreciatively from any one angle. The swaying of branches and the rustling of leaves confuse the vision and afford the onlooker no real comprehension of where the roots go or how they are nourished. The public eye sees Congress in motion, swaying and rustling, its motion in many instances serving no more effective purpose than does the wail of a forest primæval; but the public mind does not comprehend Congress in its manifold aspects,—its complex structure, its diversified work, its methods, and its moods. The average American, in fact, does not even take the trouble to use the term Congress in its correct legal sense. By Congress he means, in most cases, the House of Representatives. But the constitution expressly states that "the Congress" shall consist of both the Senate and the House. Americans are not alone in the habit of using political terms loosely. Englishmen, almost to a man, say parliament when they mean the House of Commons.

An introductory metaphor.

The House of Representatives was intended to be a reformed and popularized House of Commons. It was designed to be a very different chamber from the Senate, in that it should represent not the states but the people of the United States. Prior to 1913 it was the only branch of the national government that drew its mandate directly from the people. The other branches of government, the President and the Senate, were chosen by indirect election. Hence the House of Representatives was from the first designated as the "popular branch" of Congress. The framers of the constitution assumed, indeed, that any such body,

The "popular branch" of government.

directly elected, would be radical, impulsive, vacillating. The provisions relating to the organization and powers of the House were concessions to the cause of national democracy, made rather reluctantly by some members of the convention, but regarded by all as a practical necessity. To establish a government with no branch of it directly responsible to the people was out of the question. In all the colonies popular assemblies had grown up, and all the states in 1787 had provided for at least one such body in their new legislatures. A constitution without provision for at least one popularly-elected chamber would never have had a chance of being ratified. In view of the bitter protests which had been raised against taxation without representation in revolutionary days, moreover, the claim of the people to direct control over the "taxing power" was one which could not well be denied.

\*The basis  
of repre-  
sentation  
in the  
House.

The constitution, accordingly, provides that "the House of Representatives shall be composed of members chosen every second year by the people of the several states." In accordance with the compromises which had been agreed upon, it was further stipulated, first, that the several states should be represented according to their respective populations, and, second, that in estimating this population all other than free white persons were to be counted on a three-fifths basis; in other words, that negro slaves were to be counted at only sixty per cent of their numerical strength. The first House of Representatives was to have sixty-five members, distributed among the states in a way which was assumed to be roughly proportional, but a census was to be taken forthwith and a redistribution on a more accurate basis was to be arranged on these figures. Further provision was made that a similar redistricting should take place after every decennial census, but that the House should never contain more than one member for every thirty thousand population. No state, nevertheless, was ever to be left without at least one representative. Within these limits the size of the House is fixed by law.

Who vote  
at con-  
gressional  
elections?

As to who should have the right to vote at congressional elections, the framers of the constitution did not venture to decide. There were at the time the widest differences among the thirteen states in the matter of suffrage requirements, and it was not deemed advisable to impose upon any of them a gen-

eral provision which might be out of accord with their own practice. Hence the convention gracefully evaded the difficult question by leaving it to be settled by the state constitutions. This, to be sure, was not the logical thing to do when so much care was being bestowed upon the proper adjustment of minor questions, for the suffrage is one of the fundamentals of free government. Yet it was the best solution of the difficulty. To have set up a uniform suffrage would have made enemies for the constitution no matter on what basis the suffrage might be placed. The country was not ready for manhood suffrage in 1787. To have left the whole matter wide open for Congress to settle would have been equally objectionable, for that would give some future Congress the power to create an oligarchy by law. Nor could the determination of the suffrage at congressional elections be left, without restriction, to the legislatures of the various states, for that would have made the federal House of Representatives a creature of the state legislatures when it was designed to be responsible to the people alone. So all these alternatives were rejected, and the question of the suffrage was left to the various states under certain definite restrictions. Each state, accordingly, determines by its own constitution the qualifications for voting at elections to "the most numerous branch" of its own state legislature. These same voters, whoever they may be, have ipso facto the right to vote at congressional elections. The states, therefore, determine who shall vote in national as well as in state elections, but they do this subject to two further restrictions of a general nature, namely, that there must be no exclusion of citizens from voting rights because of race, color, previous condition of servitude, or sex. If any state withholds voting rights from any adult citizen of the United States "except for participation in rebellion, or other crime," a reduction may be made in the congressional representation from such state. If this proviso were enforced it would cut down the number of congressmen allotted to several southern states (which exclude colored citizens from voting); but Congress does not venture to enforce it. So there is no *national* suffrage in the United States, as in other countries. The national government has never conferred on anybody, in any state of the Union, the right to vote. Even the fifteenth and nineteenth amendments did not, in a literal sense, confer voting

No  
national  
suffrage.

rights; they merely provided that such rights must not be denied on specified grounds.

The framers of the constitution not only dodged the problem of a uniform suffrage but they stood mute on several other questions relating to the organization of the House. They did not determine how large a body it should be; they placed a minimum limit but no maximum. They would have better served posterity by doing just the reverse, for there has never been any danger of a House too small. The problem (and it is not yet solved) has been one of keeping it from growing too large. They said not a word as to whether the elections in each state should be by congressional districts or by the voters of the state at large. They did not even say that elections should be by ballot, or that they should be held in all the states on the same day. They left the "time, places, and manner of holding elections" to be decided by the individual states, each in its own way; but they added a saving clause which provided that "Congress may at any time make or alter such regulations, except as to the places of choosing senators."<sup>1</sup>

The first House of Representatives, which met in 1789, contained sixty-five members, which was one representative for every 33,000 people. When the constitution was before the states for ratification there was much criticism that the quota of representation had been set too high, so much criticism in fact that Madison devoted one of his *Federalist* letters to an argument that it was low enough.<sup>2</sup> Sixty-five congressmen, it was generally felt, could not fairly represent the varied interests of the country. But all basis for this complaint soon disappeared, for the House began to grow like a sunflower. Within two years it had 103 members; then it expanded to 213 in 1820. This rapidity of growth was not kept up, of course, although some increase in membership took place after almost every census. Today the membership of the House stands at 435, where it was placed after the census of 1910. No change in its size,

<sup>1</sup> Article ii, Section 4. The reason for the exception in the last clause is that the senators were to be chosen by the state legislatures at the state capitals and it was not deemed wise that Congress should have power to compel the legislatures to meet for this purpose at some other place.

<sup>2</sup> In 1787 it seemed to many minds absurd that any congressman should expect to represent as many as 30,000 people. Even with a wide acquaintance he could hardly hope to know half that number. But if the House were today based on a quota as low as 30,000 it would have about 3,000 members!

Other matters relating to Congress on which the constitution is silent.

Growth of the House in size.



and no reapportionment of representation has been made since the census of 1920 although such action is now considerably overdue.

Congress, by law, determines after each census (sometimes several years after it) how many members the House shall have. Dividing this figure into the total population gives a "quota of representation"—let us say a quarter of a million people. Then, on this basis, representatives are apportioned to the forty-eight states in accordance with their respective populations. With the quota above mentioned, a state with three million inhabitants would get twelve seats in the House. But the apportionment can never be made with mathematical exactness, for several reasons. In the first place, when the population of a state is divided by the quota of representation there is usually a fraction left over. If this fraction is large the state is often given another congressman; if the fraction is small it is usually disregarded. In the second place, the constitution requires that every state shall have at least one representative, even though its population be less than the quota of representation, and there are four states which obtain, under this rule, one congressman each.<sup>1</sup> Finally, there are always some strong political and personal influences at work when a reapportionment measure is under consideration in Congress, and minor deviations from mathematical precision are commonly made in obedience to these influences. But when all is said and done the House of Representatives comes closer to an exact population-ratio than does the popular chamber in any other country.

The House is too large. Business is impeded by reason of its bulk. There should be no thought of increasing its size. If anything, the membership ought to be reduced to 400 or less. But this, as a practical matter, is an extremely difficult thing to do. No state likes to have its allotment of congressmen cut down. A general increase makes everybody happy, but it is not so when anyone proposes a reduction. The congressmen from states which are likely to suffer a reduction will combine to oppose every such project. The best that can be hoped for, then, is to keep the House from growing larger. Even at that, some states will lose seats after each decennial census, for the rapidly-growing sections of the country will be entitled to more,

How the apportionment of members is made.

Why the size of the House is hard to reduce.

<sup>1</sup> Delaware, Arizona, Nevada, and Wyoming.

which means that other sections must be content with less. In discussions of this matter we are often reminded that the House is a good deal smaller than popular chambers in other countries. The House of Commons has 615 members, the French Chamber of Deputies has 626. But these bodies operate under a system of executive leadership which more than offsets the handicap of a large membership. If the House of Representatives were organized like the various European chambers it could double its size and still work more expeditiously than it does now; but it is differently organized and is likely to remain so.

Congress allots representatives to *states*, not to *districts*. A state is given two, three, twenty-five, forty-two seats—whatever the allotment may be. Then the state legislature (when the state has more than one representative) makes the division into congressional districts. This it does under a federal statute which requires that each congressional district must be made up of “contiguous” territory and that they shall be approximately equal in population. Prior to the passage of this statute, in 1842, many of the states elected their congressmen at large. This plan was deemed objectionable because it gave the majority party all the congressmen from the state, and the minority none at all. Under the district system, in all but the overwhelmingly partisan states, there are likely to be a few congressmen of the minority party. Massachusetts, for example, is regularly a Republican state. If congressmen were chosen at large the entire sixteen would be Republican; under the district system the Democrats usually elect three and occasionally four.

This work of redistricting a state, when it gains or loses congressmen, is performed by the state legislature, but the task is deputed in the first instance to a committee of its own members appointed for this purpose. The recommendations of this committee then go before the legislature and are acted upon. So far as practicable, an effort is made to respect local boundaries by placing a whole city or town in one congressional district, but at times it becomes necessary to place one part of a municipality in one congressional district while the remaining part goes into another. In large cities it is thought desirable, also, to respect the ward boundaries, and in great rural areas the aim is to put whole counties into the same district wherever

The  
district  
system.

Principles  
on which  
districts  
are based.

it is feasible to do so. To accomplish all these things and yet have districts approximately equal in population is sometimes quite a problem. It demands careful study and absolute fairness.

Too often, unhappily, it gets neither. State legislatures are partisan bodies, and so are their committees. Because of their intense partisanship the attempt is often made to lay out the districts in such way that the interests of the dominant political party will be served. This practice of "gerrymandering" is more than a century old; it took its name from Governor Elbridge Gerry of Massachusetts, who apparently sanctioned one of the first flagrant cases of partisan district-making in that state.<sup>1</sup> By adding one county and taking off another, by shaping the district in some unnatural way, so that in configuration its nearest resemblance may be to a shoestring or a lizard or a starfish, it is quite possible to make the area yield a comfortable majority for the candidate of the right political party. The hostile votes, on the other hand, can be "hived" or massed into a few districts which are likely to go to the opposition party in any event.<sup>2</sup> The gerrymander has been a pernicious factor in American politics, but popular sentiment has been slowly developing against it. Today it sometimes proves a boomerang to the party that attempts it.

The practice of "gerrymandering."

Sometimes a state legislature does not get its decennial re-districting finished before a congressional election comes. In that case, the old districts choose one congressman each, and if there are additional congressmen to be chosen, they are elected at large. But if the number of congressmen allotted to the state has been

Surplus members at large.

<sup>1</sup> Mr. John Fiske has given the following account of the incident:

"In 1812, when Elbridge Gerry was governor of Massachusetts, the Republican legislature redistributed the districts in such wise that the shapes of the towns forming a single district in Essex County gave to the district a somewhat dragon-like contour. This was indicated upon a map of Massachusetts which Benjamin Russell, an ardent Federalist and editor of the 'Centinel,' hung up over his desk in his office. The celebrated painter, Gilbert Stuart, coming into the office one day and observing the uncouth figure, added with his pencil a head, wings, and claws, and exclaimed, 'That will do for a salamander!' 'Better say a Gerrymander!' growled the editor; and the outlandish name, thus duly coined, soon came into general currency."

<sup>2</sup> The twenty-third district of Illinois has been known as the "saddlebag" district because it comprises two groups of counties at opposite ends of the state with a thin strip connecting them. The idea is to crowd as many Democratic counties as possible into a single district and thus make several other districts safely Republican.



reduced, all of them are elected at large, the old districts being disregarded.

Nomina-  
tions and  
elections.

Candidates for election to the House are nominated as the laws of each state may provide. Some states still retain the plan of nomination by district conventions of party delegates but the majority of the states have now provided for direct primaries.<sup>1</sup> The change, it was thought, would bring forth candidates of a better type, but it has apparently wrought no considerable improvement. The elections are held throughout the country on the same day, namely, on the Tuesday following the first Monday of November in every alternate year.<sup>2</sup> The voting must be by secret ballot, but this does not preclude the use of voting machines. Candidates for other offices, state or national, are usually chosen at the same election and on the same ballot, the so-called Australian type of ballot being the one most commonly used.

Contested  
elections  
and  
recounts.

When any dispute arises in connection with the result of the voting or the validity of the election, the House of Representatives is the deciding authority, having the sole power to declare which of the claimants is to be seated. The procedure in such cases is for the defeated candidate to serve notice upon the one who has been reported as elected, setting forth the grounds of his protest. To this the latter makes formal reply, and the papers are then transmitted to the Clerk of the House. The matter is next referred to one of the committees on elections, of which the House maintains three, and this committee hears the evidence in the case. When this is concluded, the committee reports to the House, where its recommendation is almost invariably accepted. In many cases, unfortunately, the recommendation of the committee on elections has a closer relation to party politics than to the merits of controversy.<sup>3</sup>

Contested elections are not common in the United States. The general tendency is to accept the results of the balloting as announced when the polls are closed. When the successful candidate's lead is very small, however, a recount of the votes is

<sup>1</sup> For an explanation, see *below*, pp. 460-462.

<sup>2</sup> A few states, Maine, for example, were excepted from the statute fixing this date and are allowed to hold their elections earlier in the year.

<sup>3</sup> In England, contested elections are determined by the courts, not by the House of Commons. This, of course, is a fairer method, being absolutely non-partisan.



sometimes asked for and granted under such conditions as the state election laws provide.

The qualifications of a representative, as set forth in the constitution, are merely that he shall be a citizen of seven years' standing, at least twenty-five years of age, an inhabitant of the state from which he is elected, and not the holder of any federal office.<sup>1</sup> Nothing is said about his being an inhabitant of the congressional district in which he seeks election. It is entirely permissible for a congressional district to elect a non-resident, and occasionally a district does so. But there is a strong prejudice against the outsider who enters the field against "a local man." This public prejudice is usually expressed in the plausible assertion that a local man will "know the needs of the district better." Local pride, moreover, takes offence at the implication that poverty in material compels the district to go outside its own boundaries for a congressman. An outsider, if he has a wide acquaintance in the district, can sometimes come in and win, but his chances are very slim under even the most favorable conditions.

Qualifications of representatives.

The unwritten law as to district residence.

This is a matter in which the American political tradition differs greatly from that of England. In England, the election of a non-resident to the House of Commons is not at all uncommon; on the contrary many of the political leaders represent districts (or constituencies) in which they do not reside and which they may rarely visit except on the eve of an election. The merit of the English practice is that it encourages a member of parliament to make his work appeal to more than a single district, to develop himself into a national figure. A strong man in English politics need never be without a seat in parliament; but the ablest statesman in the United States has practically no chance of a seat in Congress if his own home district contains a majority of voters who belong to the opposite political party. Theodore Roosevelt could carry the whole country when he was at the height of his popularity; but he would have found it practically impossible to get a seat in Congress from any district except the one in which he lived.

English and American usage on this point.

The reasons for American prejudice on this point do no great credit to American political ideals. They are too closely re-

<sup>1</sup> Even army and navy officers are regarded as coming within the scope of this prohibition.

Why the American voter insists upon resident candidacies.

lated to the matter of patronage. Members of the House of Representatives are pretty well paid as such things go, and every district has its crop of office-seekers. They are ready to join in the hue and cry against the "carpet-bagger." Every district, moreover, wants a share in the annual appropriations for post-offices or for the improvement of rivers, harbors, or roads. It wants a congressman who will be diligent in getting favors for his own people and in keeping such perquisites as they already have. They want a man who will "represent" the district in that spirit.<sup>1</sup>

The logical function of a representative.

Now this suggests a query as to the proper function of a representative, whether in Congress or in a state legislature or in any other elective body. Is it his duty to act in accordance with the dictates of his own judgment and in obedience to his own conception of the general welfare, regardless of whether this may reflect the opinion of his own particular district? Or, is the sole function of a representative to "represent," in other words to discover what his district desires and to be governed accordingly? These are fundamental questions which every representative must face at times. A legislator may be personally opposed to the provisions of the Volstead Act, let us say, and may believe this statute to be a gross infringement of individual liberty. Yet if a majority of the voters in his own district are known to be strongly in favor of keeping this law just as it stands, how should he vote upon the question of repealing it? Should he stultify his own judgment and convictions, or should he disregard the logic of his own position as a "representative of the people"? Is it conscience or constituents that should determine his vote? Congressmen are often confronted by this dilemma. Students of political philosophy, too, have wrestled

A concrete example.

<sup>1</sup>The following extract from the *Congressional Record* will indicate exactly what I mean: *In the House, January, 1924*. (Congressman Cramton of Michigan had introduced a bill to abolish certain public land offices where the available public lands were exhausted and where, in consequence, there was no further work for the offices to do.)

MR. TILLMAN. Mr. Speaker, I want to ask the gentleman from Michigan (Mr. Cramton) whether or not he seeks in this bill at this time to destroy about twenty land offices throughout the country?

MR. CRAMTON. To be exact, it seems to me the number is 24.

MR. TILLMAN. And among the number is the one at Harrison, Arkansas?

MR. CRAMTON. I regret to say that is the situation.

MR. TILLMAN. If the gentleman regrets that, why not strike out Harrison, Arkansas? Representing that district, I regret it also.

with the question but have reached no consensus of opinion on it.<sup>1</sup>

It may not be inappropriate to quote in this connection, however, the famous dictum of Edmund Burke in his address to the electors of Bristol when he defended certain unpopular votes which, as their representative, he had given in the House of Commons. "I maintained your interests against your opinions," he declared. "A representative worthy of you ought to be a person of stability. I am to look indeed to your opinions; but to such opinions as you and I must have five years hence. I am not to look to the flash of the day." The American legislator does not talk in that strain. The pinnacle of his ambition is to find out what the people want and to do it quickly. Whether they are wise in wanting it he does not usually stop to enquire.<sup>2</sup> He keeps his ear close to the ground, so close, as Speaker Cannon once said, that he "gets it full of grasshoppers."

The dictum  
of Burke.

The brevity of the congressman's term is in part responsible for this. He is chosen for two years only. He does not have time to make a broad record by which he may fairly be judged. His people are apt to be guided, in their estimation of his work, by the way he votes in Congress on the few outstanding measures which happen to come up during his all-too-brief span of service. So he cannot afford to take the chance of antagonizing them on any one measure even though he would be able to satisfy them on a hundred others if his term were long enough.

Congres-  
sional  
terms  
are too  
short.

The House of Representatives holds one session each year, so that there are two regular sessions between elections. These two sessions, however, are not of equal length or importance. One is a short session, beginning in December and concluding not later than the following fourth of March; the other is a longer session, beginning in December of the year following and extending through July or August. The House assembles for its short session soon after the congressional elections take place in the even-numbered years; but the newly elected congressmen do

Sessions of  
the House.

<sup>1</sup> For a further discussion see J. W. Jenks, *Principles of Politics* (N. Y., 1909), pp. 76-80.

<sup>2</sup> A legislator once told me that it was his custom to put in one pile all the letters and telegrams which came from his district in favor of any important measure. Then, in another pile he put all the telegrams and letters opposing it. When the time came for voting on the measure he merely took a glance at the two piles and went with whichever was the higher.



not take their seats at this session because their terms of office do not officially begin until the following March. Hence it is normally thirteen months after his election before a new congressman actually takes his seat in the House. It is unfortunate enough that a new President, elected in November, should not take office till the following March, but that congressmen should not begin their actual service until a further nine months have passed is one of the glaring anomalies of American government. It means that for thirteen months the business of legislation and the spending of public money may remain under the control of men who have been defeated for reelection. Laws can be enacted to carry out the program of a party that has been repudiated at the polls. Obviously that is not representative government. Moreover, the present arrangement means that although a congressman serves for two years only, the interval between the beginning of his campaign for a nomination and the close of his second session is almost four years, during all of which time he must devote a large part of his time to electioneering, getting ready to sit in the House, and actually sitting there. To earn two years' salary requires nearly four years of effort.

The two-year term for which representatives are elected is too short for the best results. Members of the popular chamber in every other country serve a longer period. The system of biennial elections was adopted in America at a time of strong partiality for short terms, and if some of the delegates in the constitutional convention of 1787 could have had their way, the congressional term would have been one year only. "Where annual elections end, tyranny begins," was a stock platitude of the day. It is quite true that congressmen are frequently re-elected nowadays, and that some of them manage to retain their seats for ten or even twenty years; but that is exceptional. Most congressmen are retired to private life after one or two terms, before they have had a real opportunity to demonstrate their capacity as legislators or even to acquire much familiarity with national problems. A congressional district is usually made up of several towns or counties, and there is a feeling that no one of them ought to hold the prize too long. Nor ought any one man to hold the place as a steady job. It ought to be passed around. The idea of rotation is strong among the politicians.

The long interval between a congressman's election and the beginning of his active duties.

Should congressmen be chosen for longer terms?



A few members manage to keep their seats for many years and become, by that very fact, the natural leaders of Congress, although they may have no other qualifications for leadership. Seniority of service determines the chairmanships of important committees and gives to the experienced congressmen a degree of influence which their own personal abilities do not always warrant. No other practice, as Lord Bryce has pointed out, could more effectually discourage noble ambition or check the growth of a class of accomplished statesmen. There are few walks of life in which experience counts for more than in politics. No one comes to Congress with an intuitive knowledge of what to do. The new member is handicapped by the complexity of the rules and by a natural disinclination to push himself too far forward until he has acquired a sure footing. Far from making the House a democratic body, in which all the members stand on an equal plane, the short term has tended to center its great powers in the hands of a few old-timers, while the great body of newer members have to be content with a minor share in the determination of legislative policy. The situation in this respect is not now so bad, however, as it was before the congressional revolution of 1910.<sup>1</sup>

Effect of short terms upon congressional leadership.

The debates in the House of Representatives are not of a high order. Nor are they so good as they used to be. This is due in part, no doubt, to the great size and bad acoustics of the chamber in which the sessions are held. Only a leather-lunged orator can make himself heard in every part of it. "It does not always happen that a powerful mind and a powerful voice are combined in the same individual, and often the member with the real message cannot be heard, while the member with nothing to say has no difficulty in filling the chamber with sound. . . . This condition tends to develop a manner of speaking that is gladiatorial and declamatory . . . and except on occasions much too rare the House does not strike the spectator in the gallery as an impressive body."<sup>2</sup> Prior to 1909 the situation was much worse, but since that time the auditorium has been reduced in size. The acoustic facilities of the House remain, however, the worst of any great legislative chamber in the world.

The standards of debate in the House.

Chamber not well adapted to forensic argument.

To some extent, again, the paucity of good speeches is due to

<sup>1</sup> See below, pp. 236-237.

<sup>2</sup> S. W. McCall, *The Business of Congress* (N. Y., 1911), pp. 108-109.

It is easier  
to print  
speeches  
than to  
deliver  
them.

the strict limitation upon the time that any speaker may keep the floor, and something may be credited to the custom of allowing a member to have his speech printed without delivering it at all. Why should congressmen make long speeches, or why should others listen to them, when it is so easy to place the speeches in printed form, at the public expense, in the hands of everyone? Members, therefore, ask for "leave to print" or for "leave to extend in print," and this request, while it requires unanimous consent, is almost always granted. Copies of such speeches, printed without ever having been delivered, are then struck off by the thousand and sent through the mails, free of postage, to the voters of the districts from which the congressmen come. The "franking" privilege, or right to make free use of the mails for all official business, has been grossly abused in this way. Magazine articles and even whole books have sometimes been reprinted and distributed broadcast by congressmen at the public expense.

The  
pressure of  
routine  
business  
leaves  
little  
time for  
speech-  
making.

These things contribute to the absence of much genuine oratorical effort in the House, but they do not account for it entirely. The stupendous mass of routine business which comes before the House day after day is the greatest of all deterrents to eloquence. The House is too busy to listen to orations or even to read them. The merely mechanical work of putting the grist of bills through their various stages takes almost every moment of its time. The last Congress, at its two sessions, received nearly thirty thousand bills, not to speak of joint resolutions, concurrent resolutions, and reports by the hundreds. Of this total the vast majority never received any serious consideration, even by a sub-committee. They went directly into the committee's waste-basket, which was for most of them the right destination. Speaker Reed once thanked heaven that the House was not a "deliberate" assembly. He was not intending to be cynical; it was merely that he appreciated the realities. If there were an earnest consideration of every measure, the House would never get its work done by sitting twenty-four hours every day in the year.

The House is not so much a law-making as a law-killing body. There is a large amount of routine business (voting of appropriations, particularly) which must be done and this necessarily gets the right of way. And no one can wax oratorical

over the dreary items of a segregated budget. So most of the discussion has been relegated to the committee rooms, and it is only matters of unusual importance that obtain a real debate on the floor of the House itself. In this respect the popular branch of Congress now discloses a family resemblance to its maternal ancestor, the House of Commons, in which debates have also ceased to thrill the nation.<sup>1</sup>

<sup>1</sup>D. S. Alexander's *History and Procedure of the House of Representatives* (N. Y., 1916) contains the best short sketch of the evolution of the House. The student who wants to delve more deeply into the subject will find plenty of material in the autobiographical writings of congressmen, such, for example, as James G. Blaine's *Twenty Years in Congress*, and Champ Clark's *Autobiography*.

## CHAPTER XIV

### THE HOUSE OF REPRESENTATIVES: ITS ORGANIZATION AND PROCEDURE

The first and fundamental law of all commonwealths is the establishment of the legislative power.—*John Locke*.

Both Houses of Congress meet at least once a year, beginning on the first Monday in December. The first session held by a newly-elected Congress (it always begins in an odd-numbered year) is known as the "long session" because it lasts from December until the following midsummer; the second session (beginning in an even-numbered year) is called the "short session" because it must come to an end on the fourth of March, inasmuch as the terms of the representatives expire on that date. Every representative, during a single term, participates in at least two sessions, and every full-term senator in at least six. In addition there may be special sessions called by the President at any time.<sup>1</sup>

How the  
House  
organizes.

When a newly-elected House assembles, its first duty is to organize. The roll is called to determine the presence of a quorum. During the roll-call the clerk of the last House presides. The oath of office is then administered to the members.<sup>2</sup> Then the election of a Speaker is in order. The House also chooses its other officers, including the chaplain, sergeant-at-arms, clerk, and doorkeepers. The rules, usually those of the **preceding** Congress, are provisionally adopted to stand until altered; and the House is then ready to proceed with the business of legislation. At this point the House joins with the Senate in sending a committee to notify the President that both

<sup>1</sup> Each new Congress, as it comes in, is officially known by its serial number. The one which convened in 1789 was designated as the first Congress, the one now in session (1925) is the sixty-eighth.

<sup>2</sup> If the validity of any member's claim to a seat is questioned, he does not take the oath until after the House has been organized and the matter decided on its merits.



bodies are ready to receive any communication he may desire to make.

The House of Representatives has full power over its own rules of procedure. The first House, in 1789, adopted a set of rules based largely upon those which had been used in the Congress of the Confederation. These, again, had been modelled on the rules of the colonial assemblies which harked back to the procedure of the English House of Commons. Each succeeding House since 1789 has readopted these original rules with various changes from time to time. On a few occasions there has been a considerable revision, but many of the provisions which were adopted in 1789 remain substantially unaltered at the present time. The rules of Congress, therefore, are not the work of any one man. They are an evolution, the growth of many centuries of legislative experience. Some of them, as, for example, the provision that a bill shall be given three readings, go back to mediæval days in English parliamentary history. In 1837 the House adopted a provision, which is still in force, that it should be guided by Jefferson's famous parliamentary manual in all matters not covered by its own rules and not inconsistent therewith, but this compendium is not now referred to very often. The House has developed its own rulings and precedents which cover almost everything that could possibly arise.

The House  
rules.

Much dissatisfaction has been expressed from time to time with the existing rules of the House. Complaint is made that they are needlessly complicated and also that they place too much power in the hands of the House "machine," which is made up of the majority leaders. It is true that the rules and precedents are complex; they require a lot of study to master. But the work of the House is complex and the rules must adapt themselves to the work. It is also true that they play into the hands of the majority leaders, but is that not in accordance with the whole theory of congressional lawmaking? If we are to have majority rule, does it not follow that the majority should be given every reasonable facility for making its rule effective? All rules of procedure have two purposes, and only two: the first is to expedite business, the second is to ensure that business shall not be rushed through too hastily. It is difficult to frame rules that will serve both purposes equally well. The Speaker is supposed to know all the rules and the precedents,

Their  
compli-  
cated  
character.

which of course he does not.<sup>1</sup> So he has at his right hand an assistant known as the parliamentary clerk or "parliamentarian" who advises him on all complicated points of order.

The Speaker, who presides over sessions of the House, is its central figure. His office is both ancient and honorable. In the English House of Commons there have been speakers for many centuries, and these presiding officers have often stood forth as tribunes of the people, defying the arbitrary authority of the crown. On one occasion, well known to students of English constitutional history, Charles I strode into the House of Commons with a body of soldiers to seize five of its members and demanded that the Speaker point them out to him. But the Speaker with dignified self-assertion replied that he had "neither eyes to see nor tongue to speak save only as this House doth command."<sup>2</sup> The king, finding himself balked in his quest, could do nothing but withdraw from the chamber. The speakership was naturally transplanted to the colonial assemblies in America, and here also its tradition continued good. The office seemed to be one that always served a good cause. So there was written into the constitution of the United States a provision that "the House of Representatives shall choose their own Speaker."

But the office of Speaker in America presently came to differ from that which had so long existed in the land of its origin. In the House of Commons the Speaker is and always has been a mere presiding officer, with no powers except those which ordinarily go with the chairmanship of any gathering. He has a few honorary functions and privileges, but they are of no political account. He is expected to be absolutely neutral in the discharge of his functions, never giving members of his own party any preference or allowing himself to be drawn into the thick of partisan controversy. He is not ousted from the chair when one political party displaces another in control of the House, but holds the office so long as he desires it. He appoints no

<sup>1</sup> These precedents have been brought together in Asher C. Hinds, *Precedents of the House of Representatives of the United States* (8 vols., Washington, 1907-1908), published also as House Document, No. 355, 59th Congress, 2d Session.

<sup>2</sup> Josiah Royce, in his *Philosophy of Loyalty* (N. Y., 1909), cites this incident as a conspicuous historical example of loyalty to a cause (pp. 102-107).

The  
Speaker.  
Origin of  
his office.

Attributes  
of the  
Speaker's  
office in  
England.

committees, attends no party caucuses, and is as absolutely non-partisan in all his actions as it is possible for any human being to be.<sup>1</sup>

Whether the makers of the constitution, when they gave the House of Representatives the right to choose its own Speaker, had in mind the English model we do not know. They were also familiar with the position held by the presiding officer of the Congress under the Articles of Confederation, a position of real authority and influence. At any rate they placed no restrictions upon the office, but left it to develop its own traditions. And it was not long before the Speaker of the House began to gather power into his own hands. Throughout the nineteenth century he kept gaining and eventually became the most powerful figure in national administration, next to the President himself.<sup>2</sup>

In  
America.

Why and how did this development of the Speaker's authority take place? Well, to begin with, it arose out of the fact that the constitution provided the House with no official leadership. Apparently the statesmen of 1787 took it for granted that Congress would lead itself, for they prohibited the natural leaders of Congress, to wit, the executive officers, from being members of it. This lack of official leadership was not sorely felt at the outset, for the House was a relatively small body and it did not have a great deal to do. But it grew with the increase of national population. With this growth in size, and with the even more rapid growth of legislative business, the need of a guiding hand became steadily more urgent. No steering could be done, as in England, by members of the cabinet because they were not permitted to sit or to speak in the House. What more natural, therefore, than the gravitation of leadership into the hands of the Speaker, as the only conspicuous officer chosen by the House itself? That, at any rate, is what happened. The Speaker became the recognized leader of the majority party, chosen virtually by its caucus. He became the man on whom the majority depended for getting its measures safely through the maze of rules. Since his powers were being used for the benefit of the majority party in the House he was tacitly permitted to go on,

Ground-  
work of  
the  
Speaker's  
powers.

<sup>1</sup> Michael McDonagh, *The Speaker of the House* (London, 1914).

<sup>2</sup> M. P. Follett, *The Speaker of the House of Representatives* (N. Y., 1909).



decade after decade, increasing his authority. The minority in Congress protested at regular intervals against this steady concentration of powers in the chair, but not until 1910-1911 was the process brought to an end and the authority of the Speaker substantially curtailed.

How the  
Speaker  
is chosen.

Before explaining the Speaker's powers, past and present, a word should be said concerning the method whereby he is chosen. In name the choice is always made by the House itself at the beginning of each Congress, that is, every second year. In practice, however, it is always agreed upon, before the House meets, by a caucus composed of members of the majority party. To be chosen speaker is a high honor, one which goes only to a man of considerable experience in Congress and of undoubted prominence in his party. If a change takes place in the relative strength of the parties as the result of an election, the next Speaker is altogether likely to be the man who served as leader of his party when it was in the minority. The caucus makes the choice and the House merely ratifies it.

His  
specific  
powers :  
(a) to  
preside and  
recognize.

The Speaker began, in 1789, as a presiding officer only. The rules and usages of the House, at the outset, merely authorized him to preserve order, to sign bills and documents, and to put questions to a vote. But many other prerogatives grew out of these. As the House grew larger, and debates grew more partisan, the Speaker's power to "recognize" members developed in importance. With limitations upon the time available for the discussion of any subject, and several members desiring to be heard, the Speaker found himself able to direct the course of debates in favor of his own friends. No member could address the House without first obtaining the Speaker's recognition, and where the Speaker's inclinations lay there his recognitions went. The power to "recognize" members is still a prerogative of the Speaker, but during the past fifteen years its use for obviously partisan purposes has been far less frequent than in the old days.

(b) to  
interpret  
and apply  
the rules

The Speaker has had, from the first, the right to apply the rules of the House, to interpret them, and to settle points of order. On many matters the rules are plain, and the Speaker has no discretion. He is also under obligation to follow the established precedents, although it is within the power of the Speaker to disregard a time-honored usage and to create a new



precedent. The most notable example of precedent-breaking, and the one most commonly cited, is a ruling once made by Speaker Thomas B. Reed with reference to what constitutes a quorum of the House. The constitution prescribes that "a majority shall constitute a quorum to do business," but does this mean that a majority of the House must be recorded as voting on a measure or merely that a majority of the members must be present, whether voting or not? For more than a hundred years the former interpretation was accepted and a quorum was not deemed to be present unless the roll-call showed a majority of the entire membership to be recorded either for or against a measure. This repeatedly led to the blocking of business by members of the minority party who, although in their seats, would concertedly refrain from voting and thus prevent the official record from showing the presence of a quorum. In 1890, Speaker Reed directed that the names of all those present but not voting should be added to the record and that if the total should prove to be a majority of the entire membership, the House should be deemed to have a quorum. Although this new ruling was bitterly attacked as unconstitutional the Supreme Court upheld it and it is the rule to-day.

He may  
make  
new  
precedents.

The power to make precedents, and to break them, enabled the Speakers to acquire a dominating influence over the course of business in the House. Weak men could not have achieved this position, but the men who occupied the chair during the greater part of the nineteenth century were strong in will and personality. It is easy to see how Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, and Champ Clark would leave their impress upon the rules and the rulings.

Nor was it merely a matter of strong personalities. The Speaker's power grew hand in hand with the growing authority of the committee on rules, of which he was chairman. Originally the committee on rules was a special or select committee, its only function being to recommend a set of rules for the House at the beginning of each new Congress. This function was of no considerable importance because the committee, as a matter of usage, merely submitted the rules of the preceding Congress. In time, however, there grew up the practice of referring to this

His old  
relation  
to the  
committee  
on rules.

committee all proposals for alterations in the rules during the course of the session and in 1880 it was made one of the regular standing committees of the House. Eleven years later it was given the right to report a new rule at any time or for any purpose, thus enabling it to intervene and cut a knot whenever business in the House should become tangled. Out of this authorization the committee on rules, with the Speaker as its chairman and dominating spirit, soon developed a power which amounted to a virtual control over the progress of all measures in the House. With the committee on rules ready to do his bidding, and a majority of the House on his side, the Speaker could secure at any time the adoption of a special rule to advance measures which he favored, or, on the other hand, to retard measures which he opposed.

The  
"revolu-  
tion of  
1910-  
1911."

The House could not be expected to tolerate this legislative dictatorship forever, and the mutterings against it became louder as time went by. Finally the insurgent members rose in their wrath and the "grand remonstrance" of 1910 took from the Speaker the power to appoint this committee on rules, increased its membership, and made the Speaker ineligible to a place on it. The committee on rules is now made up of twelve members, chosen, like all other committees of the House, by the caucus method. Its powers remain as before, but the Speaker is no longer their virtual custodian.

The  
appoint-  
ment of  
commit-  
tees :  
The old  
method.

Another channel through which the Speaker managed to become the czar of the House was his power to appoint the chairmen and members of all the House committees. Originally this power belonged to the House itself, but as a matter of convenience the duty of naming the committees was turned over to the Speaker at an early period. In those days the House was small and the work of its committees relatively unimportant. But toward the close of the nineteenth century, when its membership became so large that the House had to do nearly all its work through committees—then the selection of committeemen became far more vital. But the Speaker held on to his power, and it became his regular practice to make up the committees in such way that they would do just what he wanted them to do. If he and his "machine" favored a high tariff, he would give the ways and means committee a safe majority of high-tariff congressmen; if he desired that Congress should leave

the railroads alone, he would make sure of a standpat predominance on the committee on interstate commerce. The Speaker, in a word, controlled the committees, and the committees controlled the House. One man, in this way, determined both the form and the destiny of the laws. It was he who decided whether a measure should go on its way to the statute book or be relegated to the discard. Congressmen flocked to the Speaker's room to learn the fate of their measures—and got their information, even before they had been referred to committees. This was not lawmaking by due process, but lawmaking by decree. The members of the House tolerated this situation until it became unbearable during the reign of Speaker Cannon. Then, by a combination between the entire minority and the more independent majority congressmen, the House cast off the Speaker's yoke and took the appointment of committees directly into its own hands. This was a crushing blow to the autocracy of the gavel. Since 1911 the Speaker has been a Samson with his locks shorn.

All regular committees are now ostensibly appointed by the House. But what really happens is this: When a new Congress assembles, the members of each political party in the House hold a caucus. Each caucus selects a group of its own members to represent it in choosing the committees, and these groups make the slate of committees. The Republican caucus appoints a large "committee on committees" which decides the various assignments of Republican members. The Democratic caucus appoints the Democratic members of the committee on ways and means and they determine the assignments of Democratic members. The proportion which each party obtains on all committees is well fixed by custom. So the two groups work independently and then their lists are put together into a combined slate. The slate is then submitted by each group to its own caucus, and having been approved there, is reported to the House which accepts it without change. While it is technically true that the House appoints all its regular committees, therefore, the actual work is in the hands of groups chosen by party caucuses.

The new  
method.

Taking the appointing power away from the Speaker and vesting it in the House has not made much change in the personnel of the committees. This is because the committees are

Usage in  
the  
selection  
of com-  
mittees.

to a large extent made up according to certain fixed principles. Usage requires, for example, that seniority shall be scrupulously recognized in making up the slate. All the chairmanships go to members of the majority party who have had long service in the House. Places on the most important committees are given to senior members of both parties. The best that a new member can expect is an assignment to one or more of the less important committees. If he is reelected to the next Congress he will get something better and in time, if his party continues to control the House, he may rise to a chairmanship. Personal capacity has very little to do with it. Seniority rules the committee slates.<sup>1</sup>

Objections  
to the  
"seniority"  
rule.

In some ways this is unfortunate. It holds back men who have a natural aptitude for getting committee-work done, and pushes forward others who have no administrative capacity. For the success of its own work the House depends upon its various committees; and the committees, in turn, lean on their chairmen. Sometimes they find themselves leaning on a fragile prop, for length of service is no gauge of a man's political capacity. All this is well recognized by most congressmen, and from time to time there have been proposals to give up the seniority rule. But it is not certain that the gain from so doing would outweigh the loss. The procedure of Congress has become so complicated that none but experienced members can thread their way through its meshes, hence the senior congressmen are bound to be the more influential no matter how the committees are made up. If the seniority rule were abolished there would probably be a long and bitter fight over committee assignments at the beginning of each new Congress, thus delaying and rendering more difficult its work during the remainder of the session. The seniority rule has its defects, no doubt, but it is better to bear the evils that we know than to fly to others that we know not of.

The House has about sixty regular committees. Of these only ten or twelve have important work to do. The rest hold only one or two meetings a session, and some of them never meet at

<sup>1</sup>The member who is next in seniority to the chairman is called the "ranking member" of the committee. He is next in line for promotion to the chairmanship when a vacancy occurs, assuming that he belongs to the majority party in the House.

The  
organiza-  
tion of  
House  
commit-  
tees.



all. These inactive committees are maintained, year after year, because the chairmanship of a committee, no matter how inconsequential it may be, is entitled to an office, an allowance for clerk hire, and various other perquisites. So we find, in the *Congressional Directory*, a committee on the disposition of useless papers, a committee on mileage, a committee on Pacific Railways, and so forth. It occasionally happens, of course, that some incident will arise to give work of great importance to a minor committee; but otherwise it merely wends its somnolent way, forgotten sometimes by its own members.

The most important committees are those on ways and means, appropriations, rules, judiciary, interstate and foreign commerce, post offices and post roads, military affairs, naval affairs, rivers and harbors, agriculture, immigration, banking and currency, and insular affairs. The largest of these is the committee on appropriations, which has thirty-five members; the others have from eleven to twenty-one members each. No congressman may serve on more than four regular committees and rarely is anyone assigned to that number; but many of the senior congressmen serve on three committees and even new members are usually placed on two. The majority party in the House gives itself a safe margin on every committee.

The most important committees.

So much work is now thrown on the more important committees that they are compelled to apportion a good deal of it among sub-committees. These are appointed by the main committees, usually through their chairmen, and are given some specific matter to deal with, for example, the overhauling of the income tax schedules, or the revision of the postal laws. The sub-committees always report to the main committee.

The sub-committees.

From time to time the House orders the appointment of special committees to deal with some new and out-of-the-usual question. Within recent years this practice of appointing special committees of investigation has become more common in both Houses of Congress, in the Senate especially. Such committees are empowered to summon witnesses and to compel the production of papers. When they have completed their investigations they report and are discharged.

Special committees.

Conference committees, so-called, are also of the nature of special committees. Whenever the House and the Senate fail to agree upon any measure, each chamber appoints a delegation

Conference committees.

(usually of three members each) to effect a compromise. The work of a conference committee is done behind closed doors for obvious reasons. It may prove to be very simple, and a satisfactory compromise may be reached in a few hours. Or it may take some weeks to patch up a measure so that both sides will agree to it. At times a conference committee finds it necessary to re-write the whole bill. And occasionally it fails to effect any compromise at all, in which case the whole measure is rejected. Conference committees are *ad hoc* bodies in that they go out of existence as soon as they report on a particular measure.

Committee  
of the  
Whole.

Mention should also be made of one other congressional institution, the committee of the whole. This is merely the entire membership of the House sitting as a great committee. There are several important differences, however, between the House in committee of the whole and in regular session. In committee of the whole the Speaker does not preside, but calls upon some member to act as chairman; the strict rules of procedure do not apply; one hundred members make a quorum; there are no roll-calls on any measure under consideration—in a word the arrangement enables the House to deliberate informally. Large use is made of this facility, and the House probably sits a larger number of hours in committee of the whole than in regular session.

Addressing  
the  
Speaker.

Except when the House is sitting in committee of the whole, the Speaker is in the chair. Members who desire to be heard, rise in their places and address the presiding officer as "Mr. Speaker." The Speaker, turning to the member whom he decides to recognize, asks: "For what purpose does the gentleman rise?" After being thus recognized, a member launches into his speech but may be interrupted by any other member and asked to "yield the floor" in order that some explanation or brief interpolation may be made. Whereupon the Speaker enquires "Does the gentleman yield?" The member having the floor may then yield or not as he chooses, but the usage of the House is that a member does so when requested. Congressmen are not addressed by name on the floor of the House. It is "the gentleman from Ohio," or "the gentleman from Texas." The Speaker may himself take the floor, and occasionally does so. In that case he calls some member to take the chair temporarily. He has a

vote on all questions and not merely in the event of a tie, as is the case with the Vice President of the United States who presides in the Senate. By becoming Speaker he loses none of his rights or privileges as a member. Having once voted on a question, he may not, however, vote again to break a tie. In the case of a tie, if the Speaker has already voted, the motion is deemed to be defeated.

Having noted the functions of the Speaker and the organization of the committees we are now in a position to understand, more readily, the several steps in the process of lawmaking. In the first place any member of the House may present a bill or draft of a proposed law. It may be one that he himself has prepared and favors, or it may be one that any outside individual or organization has asked him to introduce.<sup>1</sup> The procedure is simplicity itself; the congressman merely writes his name on the bill and places it in a box at the clerk's desk. Thousands of bills are put in during the opening days of each session. This freedom with which bills may be introduced has both good and bad features. It gives reality to the citizen's constitutional right of petition and perhaps encourages the putting forth of new legislative ideas. On the other hand, it permits Congress to be deluged with all manner of eccentric proposals which have no chance whatever of being adopted. It should be mentioned, of course, that the proponent of any bill (except a revenue bill) may have it introduced in the Senate rather than in the House, if he so desires; but as a matter of practice the great majority of bills are introduced in the House.

Presently all these bills are sorted out, given serial numbers, and referred to the regular committees. If there is any doubt as to what committee should have a particular bill, the Speaker decides.<sup>2</sup> Meanwhile the bill is put into printed form at the public expense. If a measure is of great importance, the committee to which it is referred may assign different portions of it to sub-committees. The work of these sub-committees has become increasingly important in recent years and in many cases the real work of getting measures in shape for presentation to

The steps in the making of a law.

1. How bills are introduced.

2. Reference of bills to committees.

3. Committee hearings.

<sup>1</sup> Neither the President nor any member of the cabinet can introduce a measure directly, but only by having some senator or representative introduce it for him.

<sup>2</sup> Sometimes a bill is divided between two committees.



Congress is performed by them. Committee proceedings are usually public, but executive sessions may be held when desired. In any case the committee or sub-committee will hear all who want to be heard either for or against the bill. This is done as a matter of courtesy, not of constitutional or legal right; but the opportunity to be heard is practically never denied to anyone. If many persons desire to appear before the committee, the hearings may last, day after day, for weeks. Lobbyists and paid attorneys appear and argue for or against the measure, so that the committee room sometimes takes on the atmosphere of a supreme court. The members of the committee ask questions and sometimes enter into the argument. Committees usually sit in the forenoon, and no committee, except the committee on rules, may hold meetings while the House is in session unless it secures special permission from the House itself. During these hearings a record of the proceedings is kept by the clerk of each committee. When a hearing is finished, the committee decides, either at once or on a later day, what report, if any, it will make to the House on the measure.

**4. What action the committee may take.**

Several courses are open to any committee with reference to a bill which it has had under consideration. It may report the bill just as it stands. In that case the measure will have a good chance of passing, especially if the favorable recommendation of the committee is unanimous. Or the committee may approve the bill with some amendments of its own. Or it may redraft the measure and report it in a new form. Here, too, the chances of passage are good. When a favorable report is made upon any measure, either in its original or revised form, the report goes to the clerk of the House, who enters it upon the journal, and in due course it is set upon one of the calendars for a first reading. Certain committees have the privilege of reporting at any time directly from the floor of the House, although this is now not usually done.

**The asphyxiation of bills in committee.**

But in the great majority of cases the committee will not be favorably impressed with the measure, in which case it does not need to report unfavorably but merely makes no report at all. Many thousand bills are introduced at each session of Congress, and the great majority of these have not the slightest chance of ever "coming out of committee." On the average a committee reports about five per cent of the bills referred to it;



the other ninety-five per cent go into the "pigeonholes" of the chairman's desk. The simplest way to kill any proposal is, therefore, to have a committee refrain from reporting it, because no bill can be acted upon by the House until a committee sends it up. Since 1910 it has been possible, in certain cases, for the House to call up a bill from the hands of a committee and proceed to action upon it; but this is very rarely done. While favorable action by a committee does not, therefore, mean that a bill is assured of passage, adverse action, which is no action at all, becomes a sort of automatic asphyxiation. Most bills are smothered by committees, as indeed they ought to be. The committees of Congress are, therefore, the lubricants of the legislative machine. Without them the introduction of bills would have to be rigidly limited or the whole mechanism of law-making would become hopelessly clogged.

When a measure is reported to the House by a committee, it is placed on one of the calendars so that it will be given its various readings and voted upon. There are three calendars. One of them, known as the Union calendar,<sup>1</sup> contains all favorably reported measures relating to revenue, appropriations, and public property. A second, called the House calendar, includes all public bills not included in the foregoing category. The third, known as the calendar of the committee of the whole, or the private calendar, makes a place for all measures of a private character.<sup>2</sup> Matters on each calendar are not necessarily, or even usually, taken up in order; they may be called up out of turn and this is frequently done because the calendars become so long that bills which stand near the bottom cannot be reached before the end of the session.

There are various ways of getting a bill advanced from its regular place on the calendar. Revenue bills and appropriation bills can be given the right of way by majority vote of the House at any time. Special days are set apart for a designated class of measures. And by a two-thirds vote the House can suspend its rules and depart from the regular order as far as it pleases. This regular order is as follows:

At every daily session there is a "morning hour" (it may be an hour or a whole day) for the consideration of general bills

**Procedure  
in the  
House :**

**1. The  
calendars.**

**2. Calling  
up bills.**

<sup>1</sup> Its full title is "Calendar of the Whole House on the State of the Union."

<sup>2</sup> For example, bills granting pensions to designated individuals.

called up from one of the calendars by committees which have favorably reported upon them. Then, if time permits, the House goes into committee of the whole to discuss revenue or appropriation bills, or, failing these, some other public bills on the House calendar. But the regular order of business is frequently interrupted by reports from privileged committees or by vote of the House. Indeed it can fairly be said that, toward the end of a session, the regular order is more honored in the breach than in the observance. "The House," it has been aptly said, "is a single-track road."<sup>1</sup> Passenger trains (important or urgent bills) get the right of way. Among passenger trains it is the limiteds, the through-flyers, that take the main track and stall the others on the sidings. The House has too much traffic to handle, so it must pick and choose as best it can.

3. The  
three  
readings.

Every bill, of whatever sort, must have three readings in the House. The first reading is by title only; the second is a reading of the whole measure, and at this stage amendments may be offered; the third reading is also by title unless some member requests that it be again read in full, which hardly ever happens. If the measure passes to its third reading, it is engrossed (or carefully typed by engrossing clerks) and must go through a further formal stage of being finally passed by the House before it is sent to the Senate for concurrence. Four methods of voting are used. The common plan is by *viva voce* vote. Any member may doubt the result and call for a rising vote. If a certain number of members so demand, the vote is again taken by tellers who are appointed by the Speaker. The members pass between the tellers and are counted. Finally, the constitution provides that if one-fifth of the members ask for it, the ayes and nays shall be recorded. A roll-call must always take place when the passing of any measure over the President's veto is being decided. Reconsideration may be asked for after the House has voted. When the measure succeeds in running this entire gauntlet of readings and votes, it does not become a law, of course, but merely goes to the Senate, where substantially a similar course of procedure is encountered.

4. The  
debate.

When a bill is reached on one of the House calendars or is called up out of turn, the usual practice is for the chairman or

<sup>1</sup> D. S. Alexander, *History and Procedure of the House of Representatives* (Boston, 1916), p. 222.

some other member of the committee which has reported it to open the debate. If the report has not been made unanimously, some minority member of the committee then follows with a speech in opposition. When members of the committee have had their say, other congressmen are recognized in their turn, and thus the debate runs on. No member may address the House for more than one hour without unanimous consent, and when the House is in committee of the whole, speeches are limited to five minutes only. If there is any likelihood of a long debate, it is customary for the House, by unanimous consent at the beginning of the discussion, to fix a time at which a vote will be taken. The previous question may also be moved at any time as a means of bringing a debate to a close. The best discussions do not take place when the House is in regular session, but in committee of the whole, under the five-minute rule. This is because short, snappy speeches, with members answering quickly the arguments of each other, hold the attention of the House, while long and carefully prepared addresses do not.

When the House has finished with a measure, it is certified by the clerk and taken to the Senate chamber. What may the Senate do with it? It may do any one of three things: It may pass the measure without change. It may defeat it or let it die in committee. Senate committees, like those of the House, have the habit of pigeonholing unpalatable measures. Or it may pass the measure after making some amendments. In this last case the bill must come back to the House for a vote on the amendments; if the House accepts them, well and good, but if it declines to accept the Senate's amendments, the usual plan is to ask for a committee of conference. If the conference committee can reach an agreement, the two Houses usually accept their recommendation; if they cannot agree, the measure fails. Nothing can become a law unless both Houses have concurred upon every word of it.

When a bill has passed its various stages in both chambers, it is signed by the Speaker of the House and the presiding officer of the Senate, after which it is laid before the President for his approval or veto. If signed by the President, or if it becomes a law without his signature, it goes to the archives of the state department and in due course is published in the statute book of the nation.

Bills sent to the Senate for concurrence.

The final steps in congressional legislation.



The powers of the House and the Senate in lawmaking are exactly the same, save for the exceptions already noted, namely, that the House has by constitutional provision the sole right to originate bills for raising revenue, and by usage it has acquired the exclusive power to initiate appropriations. But the Senate may amend bills of either sort, even to the extent of making practically new measures out of them.

The House of Representatives compared with the House of Commons.

Comparing the House of Representatives with the House of Commons, some striking similarities and contrasts come into view.<sup>1</sup> Both do most of their work through committees, and the general procedure followed in the passing of measures is in both substantially alike. But in Congress no broad distinction is made between "government" measures and measures of any other sort, or even between public and private bills. All are dealt with in the same way, save that they appear on different calendars. In England there is a special procedure for private bills, that is, for bills which concern only an individual or an organization or a locality, and which accordingly are not deemed to be of general importance. All private bills go to special (select) committees and the House of Commons is almost absolutely governed by their recommendations. Relatively little time is devoted on the floor of the House of Commons to this category of measures, and hence more time is left for the consideration of general laws. This permits and encourages more discussion and debate in the English chamber. The great powers of Congress, again, are almost equally shared by the Senate and the House, whereas in parliament the lower chamber has long been dominant, and since 1911 it has become potentially supreme. The presence of cabinet officers in parliament and their absence in Congress is another striking difference and one which has far-reaching results upon the course of business. Finally, and perhaps most important of all, the members of the House of Commons and of the House of Representatives are alike ranged into well-defined and relatively permanent party divisions, which support or oppose the administration. It is this more than anything else that betrays the kinship of the two great English-speaking organs of popular government. The House of Representatives was created in conscious imitation of the House of

<sup>1</sup> See the author's *Governments of Europe* (N. Y., 1925), Chap. viii.



Commons. In externals there is not much resemblance between the two to-day, but if one looks below the surface a fundamental similarity will readily be seen.<sup>1</sup>

<sup>1</sup>The best book for the study of comparative legislative methods is Robert Luce's *Legislative Procedure* (Boston, 1922).

## CHAPTER XV

### THE GENERAL POWERS OF CONGRESS

Governments, like clocks, go from the motion that men give them; and as governments are made and moved by men, so by men they are ruined too.—*William Penn.*

The law of legislative powers in the United States.

(The Senate and the House of Representatives together constitute the Congress of the United States. Congress is commonly spoken of as the lawmaking branch of the national government, but it is a good deal more than that. It is the organ through which the people frame, declare, and supervise the policies of the nation. But this power of the people to declare through their representatives in Congress the laws by which they wish to be governed, and the policies they desire to be pursued, is not an unlimited power. Unlimited power cannot be exercised by any branch of American government,—executive, legislative, or judicial,—or even by all three acting together. Limitations there are to a greater extent than in any other country, and the greatest of these limitations upon the powers of Congress arises from the theory of the constitution itself.)

The powers of Congress are delegated powers.

The Constitution of the United States, as has been already shown, is a grant or delegation of powers. In that respect it differs from the constitutions of the several states, for in the latter all powers accrue as an incident of their original sovereignty. By the national constitution Congress gets only what is therein given; by the state constitutions every state legislature gets whatever is not expressly taken away. In the case of Congress the appropriate question is: Has the power been granted? In the case of a state legislature it is: Has the power been handed over to the national government, or limited, or withdrawn? This difference is of vital importance, so much so that it can scarcely be over-emphasized. Without keeping it constantly in mind there can be no proper understanding of the

way in which Congress acts or of the limitations that surround its sphere of action. The government of the United States has no powers *ex proprio vigore*, none save such as are expressly or by reasonable implication conveyed to it by the terms of the constitution. The constitution is the source, and the sole source, of all its authority.

For every power claimed by Congress it is necessary to find some justifying words within the four corners of the constitution. Never has this principle been more clearly or cogently stated than in the words of Thomas Jefferson. "To take a single step beyond the boundaries thus specifically drawn around the powers of Congress," wrote the great Virginian, "is to take possession of a boundless field of power no longer susceptible of any definition. The government created by the constitution was not made the exclusive, or final, judge of the extent of the powers delegated; since that would have made its discretion and not the constitution the measure of its powers." Congress possesses what has been given to it, and no more. This basic principle of American government has been upheld by the Supreme Court for over one hundred years, and it is not now open to controversy.

Jefferson's  
statement  
of the  
matter.

It is true that the doctrine of "inherent powers" has at various times been set forth as justifying the exercise by Congress of powers which the constitution does not either expressly or by implication convey; but the doctrine of inherent authority is not a sound one. The Supreme Court, to be sure, has not been unequivocal in repudiating this theory that the national government possesses certain powers which are "deducible from the simple fact of national sovereignty," but it has never yet justified any act of Congress on the ground of inherent powers. It has always found some warrant, either express or implied, in the words of the constitution itself.<sup>1</sup>

The  
contrary  
doctrine of  
"inherent"  
powers.

Until the several states accepted the Articles of Confederation each was sovereign and unrestricted in its freedom of action. The Declaration of 1776 asserted that the former British colonies were "free and independent states," with power to do all things that "independent states may of right do." Each of the thirteen states thereupon became free to do as it

First step  
in the  
delegation  
of powers:  
the  
Articles  
of Confed-  
eration.

<sup>1</sup> W. W. Willoughby, *Constitutional Law of the United States* (2 vols., N. Y., 1910), pp. 67-69.

pleased, to wage war or make peace independently if it so chose, to coin money, issue bills of credit, conclude treaties, establish a tariff, maintain its own postal service, even to set up a monarchy if it so desired.<sup>1</sup> But upon ratifying the Articles of Confederation during the years 1777 to 1781 each of the thirteen states gave up, in the general interest, a certain amount of this freedom. They all agreed, for example, that none would make treaties separately; they agreed to contribute men and money to the common cause when called upon by the Congress of the Confederation, to maintain a common postal service, and to do various other things together. But they still remained sovereign states, for these concessions, even when taken all together, were not a serious impairment of their individual sovereignty.<sup>2</sup>

Second  
and final  
step in the  
delegation  
of powers:  
the Consti-  
tution.

By accepting the constitution of 1787, however, the several states took a far more important step. They surrendered powers of greater variety and extent. The nature of the change was clearly expressed by Chief Justice Marshall in one of his great decisions:

"It has been said that they (the states) were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which the change was effected."<sup>3</sup>

They gave up, in fact, some of the most important prerogatives of sovereignty, and although we still speak of them as sovereign states, they are not strictly entitled to be so termed. They are sovereign within their own limited field of action, and not beyond it.

<sup>1</sup> This, at any rate, is the author's conviction. For a statement of the evidence which leads to such conclusion, see Roger Foster, *Commentaries on the Constitution of the United States* (Boston, 1895), pp. 63-70. For a contrary view, see Albert Bushnell Hart, *National Ideals Historically Traced* (N. Y., 1907), p. 136.

<sup>2</sup> "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled."—*Articles of Confederation*, Article ii.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheaton, 1.



There is no denying that the states gave up large powers when they accepted the federal constitution. Did they, however, surrender these powers to the national government forever, or did each state impliedly reserve the right to resume them at some future time if circumstances should so dictate? That is a question which bulked large in American political controversy during the decades preceding the Civil War. Could a state, in other words, nullify a power given by the constitution to Congress by insisting upon its own interpretation as to what such power was meant to include? Could a state secede from the Union and thus resume its full sovereignty? These two questions, involving respectively the right of nullification and the right of secession, were eventually answered, not by political philosophers but by the logic of events.

The delegation of powers was made in perpetuity.

South Carolina in 1832 asserted its famous policy of nullification based upon the contention that whenever Congress went beyond the limits of power granted to it by the constitution, any state was at liberty to declare such action unauthorized and null. This doctrine found its protagonist in John C. Calhoun.<sup>1</sup> His interpretation of the constitution gave the various states a "negative power, the power of preventing or arresting the action of the government, be it called by what term it may—veto, interposition, nullification, check, or balance of power." The states, in other words, were the ultimate arbiters of congressional authority. Acting upon this conception of ultimate state sovereignty, South Carolina in 1832 attempted to nullify certain acts of Congress. But the attempt did not succeed. The federal authorities under Andrew Jackson's vigorous leadership took up this gage of battle, and in short order forced South Carolina to recede from her position of defiance.

Nullification and its failure.

The question whether a state had the right not merely to refuse obedience to acts of Congress but to withdraw from the Union altogether and thus to repudiate the compact of 1787 came to the front in a much more serious form twenty-eight years later. Threats of secession had been made by various states from time to time during the first half of the nineteenth century, but it was not until December 20, 1860, that any state

Secession—a far more difficult problem.

<sup>1</sup> For a full statement of the doctrine, see his *State Papers on Nullification* (1834); also David F. Houston's *Critical Study of Nullification in South Carolina* (N. Y., 1896).

took the actual step of seceding. On that date South Carolina once again assumed the initiative by declaring that "the union now subsisting between South Carolina and other states under the name of the United States of America is hereby dissolved." Within a few months ten other southern states took similar action.

Claims of  
the seces-  
sionists.

The right to secede from the Union and thus to reacquire all the powers which had been surrendered to Congress in 1787 was based upon several contentions which need not be enumerated here. They may be epitomized in the claim that the constitution was nothing more than a treaty or compact among the states, and that the violation of its terms or spirit by some of the states freed the others from the obligation of being further bound by it.<sup>1</sup> Webster and others replied that the constitution was not a compact among the states but an agreement among the people. They pointed to the very words of its preamble "We, the people of the United States . . . do ordain and establish this constitution."

During the years preceding the Civil War the whole question was argued from every angle but with no approach to an agreement. Both sides appealed to history and distorted history to suit their respective contentions. The constitution itself is dumb on whether the states had the right to withdraw from the Union after once entering it. Nothing was said about the matter in the convention of 1787, and quite naturally so. The framers of the constitution were worrying about how to get the states into the Union, not how to let them out again. They had troubles enough without starting controversies on questions which were of no immediate interest at the time. They left the secession issue for posterity to deal with if it should ever arise. And it did arise. Men argued bitterly about it, went to war over it, and finally settled it at Appomattox.

Perpetual  
nature of  
the Union  
established.

Blood and iron rendered their verdict in 1865. Since the day that Lee handed his sword to Grant this stormy petrel of American politics has been at rest. No state has the right to take back any of the powers or functions which it agreed to give

<sup>1</sup> Jefferson Davis, President of the Confederacy, in his message to the Congress of the Confederate States (April 29, 1861) gave a full statement of the secessionist doctrine. This is elaborated in his *Rise and Fall of the Confederate Government* (N. Y., 1881), i, pp. 1-258.

to the national government by the compact of 1787. These powers form the permanent endowment of Congress. They can be withdrawn in one way only, that is by the concurrence of three-fourths of the states as provided in the constitution.

Three points, accordingly, are now well established in American constitutional jurisprudence. First, that the constitution is a grant of powers and that Congress has no lawmaking authority save as is therein conveyed; second, that within its own legislative sphere, as delimited by the constitution, the authority of Congress is supreme; and, third, that no state has the right either to nullify this supremacy by a refusal of obedience or to secede from the jurisdiction of the federal government. "The government of the Union," said Chief Justice Marshall in his most famous decision, "is acknowledged by all to be one of enumerated powers." "But," he adds, "it is emphatically and truly a government of the people" and the people "did not design to make their government dependent on the states." Therefore, "the government of the Union, though limited in its powers, is supreme within its sphere of action. It is the government of all that acts for all."<sup>1</sup>

Summary of the constitutional bases of congressional powers.

Having thus seen the constitutional basis of its authority, let us now turn to the actual powers of Congress. These may be classified in various ways. One method of classification is according to the form in which they are granted, whether in express terms or by implication. Another is according to the degree of obligation imposed by various powers, in other words whether they are permissive or mandatory. Finally, and most significant, is the classification of the powers of Congress according to their scope, nature, and importance.

The classification of the powers of Congress.

Does Congress possess only those powers which are granted by the constitution in express terms? Or does Congress also possess powers which, though not expressly granted, may be reasonably implied? This was a point of clash between the Federalists and the Anti-Federalists during the early years of the Union. Hamilton and the Federalists argued that there ought to be no strict construction of the constitution's terse phraseology, no reading of the words with a microscope and a dictionary. On the contrary he argued that where an express power had been granted, this should be construed to carry with

Express and implied powers.

<sup>1</sup> *McCulloch v. Maryland* (1819), 4 Wheaton, 316.

it any authority desired by Congress to make its power effective. The Federalists placed great emphasis on that clause of the constitution which confers on Congress the right "to make all laws which shall be necessary and proper for carrying into execution" the powers expressly granted. The Anti-Federalists took the opposite ground, maintaining that the long enumeration of express powers granted to Congress in the constitution was meant to be complete and that other powers should not be added by implication. Between these divergent views the Supreme Court, in the notable decision which has just been mentioned, took a stand which involved a near approach to the Federalist claim. "The sound construction of the constitution," said Chief Justice Marshall in this decision, "must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people." A narrow construction, he declared, would hamper the operations of government and make it incapable of performing the functions that it was established to perform. Then, with sledge-hammer blows, Marshall drove home the court's decision in these pregnant words: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consist with the letter and spirit of the constitution, are constitutional."<sup>1</sup> An express power, in short, may be carried beyond its own phraseology. The doctrine of implied powers was thus given recognition in 1819 and it has ever since been a well-established rule or principle of American constitutional interpretation.

Some of the most important functions which the federal government performs to-day have their basis in "implied" powers. The right of Congress to provide for the establishment and supervision of national banks, for example, is not an express power, for the constitution contains no mention of banks or banking. The power is implied, or at any rate has been held by the Supreme Court to be implied, in the express power "to borrow money on the credit of the United States." The right of Congress to authorize the enforcement of "wheatless" and

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheaton, 316.



"meatless" days in war-time or to compel the shutting down of stores and industries in order to conserve the fuel supply (as was done in 1917-1918) is nowhere expressly granted in the constitution. It is implied, however, in the express power "to raise and support armies." Nor, again, does the constitution expressly give Congress the right to own and operate railroads, yet this authority may be and doubtless is implied in the power "to establish post-offices and post-roads" or in the power to regulate commerce among the several states. The power to establish carries with it the power to maintain; and the power to regulate implies the authority to choose any agencies of regulation which are in fact adapted to the end in view.

The powers of Congress, as expressly or by implication granted in the constitution, are for the most part permissive in character. That is to say, Congress may exercise them or may not as it sees fit. It may make use of them much, little, or not at all. The clause which provides that Congress "shall have power . . . to borrow money" obviously does not mean that Congress shall borrow money whether the country is in need of it or not. But on the other hand there are some powers which notwithstanding their permissive phraseology are mandatory in effect. Wherever, for example, some action on the part of Congress is necessary to make any provision of the constitution effective, it can hardly be argued that the function of Congress is a discretionary one. To give an illustration: the constitution provides that the Supreme Court shall have appellate jurisdiction "under such regulations as Congress shall make." But if Congress should make no regulations, the court would then have no appellate jurisdiction at all and the entire judicial system would be in chaos. Again, the constitution provides for a re-apportionment of representatives after each decennial census, this census or enumeration to be taken in such manner as Congress shall by law direct. But if Congress should fail to provide the machinery and the money for taking the census, the re-apportionment prescribed by the constitution could not be made. Congress is, therefore, under constitutional obligations to make use of its powers in such cases. If it should decline to do so, however, there is no way of applying compulsion. The Supreme Court will not order Congress to pass a law, and if the court were to issue such an order there would be no way of enforcing it. It could hardly

Mandatory  
and  
permissive  
powers.

indict a whole nation, and put an entire Congress in prison for contempt.

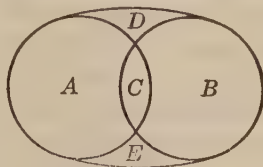
A word should be added concerning the distinction between exclusive and concurrent powers. Where a power has been granted to the national government, and is not prohibited to the states, it may be exercised by both concurrently unless Congress assumes exclusive jurisdiction, which it may do whenever the power is one that from its nature cannot be shared by two authorities. In only one case is concurrent power expressly given to both the national and the state governments, namely in the eighteenth amendment.

Broadly speaking, all legislative powers are divided by the constitution into four groups. First, there are certain powers which are forbidden to be exercised either by Congress, or by the states, or by both. Second, there are various powers which are vested in Congress alone, to the exclusion of all state authority. Third, there are certain concurrent powers, which Congress and the state authorities share. And finally, there are all the remaining powers of government forming the residuum which reverts to the states.<sup>1</sup>

The powers prohibited either to Congress, or to the states, or to both, are of a considerable range. Some are powers which no free government ought ever to exercise; for example, the power to pass bills of attainder, or to enact *ex post facto* laws, or to deprive any one of his life, liberty, or property without due process of law. The exercise of these powers is forbidden to both the national and the state governments.

But in addition there are other powers, not by their nature despotic or arbitrary, which had to be vested in some central authority and hence were prohibited to the states so that they

<sup>1</sup> The division may be made somewhat clearer perhaps, by the following diagram:



Let the ellipse represent the totality of governmental powers. Then Circle A includes all powers granted to the national government, Circle B all powers reserved to the states; Segment C, the few powers which are

Exclusive  
and  
concurrent  
powers.

The four  
groups of  
powers  
provided  
for in the  
constitution.

1. Powers  
prohibited  
to both the  
nation and  
the states.

2. Powers  
prohibited  
to the  
states only.

might always be exercised by Congress alone. The states, accordingly, were forbidden to make treaties, or to coin money, or to lay taxes on either exports or imports.

The constitution contains eighteen clauses expressly granting powers to the national government, hence the customary reference to "the eighteen powers of Congress." There are really more than eighteen powers, however; some of the clauses convey more than one. The section which contains the enumeration of these powers is the longest single section in the constitution and

concurrent powers, i.e., exercisable by both federal and state governments; Segment D, powers prohibited to the nation, and Segment E, powers forbidden to the states. The following are the most important powers that would be placed within the aforementioned circles and segments:

3. Powers expressly given to Congress

NATIONAL POWERS	CONCURRENT POWERS	PROHIBITIONS UPON THE NATION	PROHIBITIONS UPON THE STATES	STATE POWERS
To conduct foreign affairs. To raise and support armies. To maintain a navy. To regulate foreign and interstate commerce. To coin money. To establish a postal service. To grant patents and copyrights. To admit new states.	To tax. To borrow money. To promote education. To encourage agriculture. To charter banks and other corporations. To enforce the Eighteenth Amendment. To establish and maintain courts.	To abridge freedom of worship or of the press or of assembly or of petition. To deny any of the other privileges enumerated in the Bill of Rights (see Amendments I-X). To permit slavery in any territory within the national jurisdiction. To abridge the suffrage of citizens on account of sex. To give preference to one state over another in matters of commerce.  To pass any bill of attainder or <i>ex post facto</i> law. To grant letters of nobility. To levy duties on exports.	To keep troops or ships of war in time of peace. To enter into any treaty. To coin money or issue bills of credit. To pass any law impairing the obligation of contracts. To lay any tax or duties on imports. To abridge the privileges or immunities of citizens of the United States, or deprive them of life, liberty, or property without due process of law or deny to persons within their jurisdiction the equal protection of the laws. To abridge the voting rights of citizens on account of race, color, previous condition of servitude, or sex.	To make and enforce the ordinary civil and criminal laws. To establish and control local government. To conduct elections. To regulate commerce and industry within the state. To protect the life, health, and morals of the people (the "police power").

also the most important.<sup>1</sup> It furnishes the national government with its motive power, and indeed without this particular section Congress would be a body of very little consequence. This section forms the engine of the whole national mechanism.

Taken as a whole the legislative powers of Congress may be grouped under eight heads: (1) *Financial*, the power to levy taxes and to borrow money. (2) *Commercial*, the power to regulate foreign and interstate commerce. (3) *Military*, the power to declare war, to raise and support armies, to provide for the organization, arming, and calling forth of the militia, and the power to maintain a navy. (4) *Monetary*, the power to coin money, to regulate the value thereof, and to protect the currency against counterfeiting. (5) *Postal*, the power to establish post-offices and post-roads. (6) *Judicial*, the power to constitute tribunals inferior to the Supreme Court. (7) *Miscellaneous*, including powers in relation to naturalization, bankruptcy, patents, copyrights, and to the government of the national capital. (8) *Supplementary*, the power to make all laws which may be found "necessary and proper for carrying into execution the foregoing powers." Not all of these powers are of equal scope and importance. The first three categories—financial, commercial, and military—are of greater significance than all the others put together.

Naturally enough, no enumeration of powers retained by the states is made in the constitution. There was no need to do it; the states merely retained all that they did not give away. All powers not conveyed by the constitution are state powers. If this was not sufficiently clear at the outset, the tenth amendment soon made it so.<sup>2</sup> The residuum which remains with the states is very large, including as it does nearly the whole field of civil and criminal law, the chartering of corporations, the supervision of local government, the maintenance of order, the control of education, and the general administration of nearly all the things which touch the daily life of the people.

This distribution of powers will enable anyone to understand why the British parliament is termed a *constituent* body while Congress is commonly called a *lawmaking* body. Parliament is supreme in the British empire. Its powers embrace all govern-

<sup>1</sup> Article 1, Section 8.

<sup>2</sup> See *above*, p. 56, footnote.

How these powers may be classified.

Powers which remain with the states.

Constitutional powers and law-making powers.



mental authority. There is no earthly authority above it, no written constitution to restrain it, no supreme court to overrule its acts; there is no sphere or field of government in which it may not operate, no act of government which it may not perform. Congressmen represent the people; but parliament *is* the people. Congress is merely an agent, while parliament is a principal. Whatever the nation can do in its sovereign capacity, parliament can do. It is not restrained by a constitution, because its acts make up the constitution, and hence nothing that it does can be unconstitutional. Congress, on the other hand, is the American nation for one purpose alone, namely, for exercising certain powers delegated to it by the states. All this would seem to mark a very important difference.

But when we speak of Congress as a lawmaking body, we should remember that it is something more than this. Congress is, to a certain degree, a constituent (or constitution-making) body also. Every change that has been made in the constitution since its adoption has been proposed and initiated by Congress. The states have merely ratified. Changes in the constitution can be made, of course, without action by Congress but in actual practice this has never happened. Congress is also, in a very real sense, an administrative body, for it controls and directs the whole work of administration. It provides the money without which the laws could not be executed or justice administered. It determines the pay of everybody in the service of the government. It may investigate anybody or anything at any time. When it does so it becomes vested with many of the functions, and most of the authority, of a court. We have seen committees of Congress haling men and women before it, virtually placing them on trial, and subjecting them to a penalty that is sometimes worse than fine or imprisonment, that is, the opprobrium of public opinion. So the powers of Congress are not legislative alone—they are to some extent constituent, administrative, and judicial as well. We call it a lawmaking body because lawmaking is the chief function of Congress, not because it is the only one.

Congress  
is more  
than a  
lawmaking  
body.

English writers have laid far too much stress upon the "omnipotence of parliament," as contrasted with the "limited range of authority" which Congress enjoys. As a matter of political theory this contrast may be worth mention but it should not be

allowed to render the disservice of making anyone imagine that there is more lawmaking at Westminster than at Washington, or that laws of more far-reaching importance are made on the Thames than on the Potomac. Judged by what it does, not by what it might do if it dared, parliament stands not a whit above Congress among the lawmaking bodies of the world. Its deliberations do not exercise a greater influence upon the destinies of humankind.

The liberty of the individual congressman compared with that of a member of parliament.

Eulogists of the English parliamentary system of government have laid great emphasis upon the way in which public proposals can be formulated by a few ministerial leaders and carried through with exemplary speed. They assure us that the process of lawmaking is carried on in England with great promptness and efficiency, while in America it is not only slow and cumbersome but results in the hopeless mutilation of measures during their progress through the legislative body. On the face of things, what they say is true. Under normal conditions a government measure, when laid before the House of Commons, is sure of adoption without material change. It will be steered through the House by the minister who prepared it and who is responsible for getting it enacted. If the opposition becomes factious, the minister will call for the closure and, with a majority at his back, put the clauses of his bill through the House with an iron hand. It is the theory of English government that the ministers shall tell parliament what to do and that parliament shall either do it or get another ministry. A theory, indeed, that sounds like business! The English system provides leadership and concentrates responsibility.

The English insistence on party loyalty.

But there is another angle of approach to this matter. Leadership is desirable, even essential, in all legislative bodies. All except those who lead, scold about leadership, or the lack of it. Concentration of responsibility is also a desideratum. But the English House of Commons has purchased these things at a considerable price—by sacrificing the independence of its individual members. It is pure empiricism to assert that all the members of the House of Commons have a voice in the making of the laws. A relatively small group of parliamentarians, that is, the members of the ministry, determine under normal conditions what the action of the House shall be. The remaining members merely vote for or against as their party allegiance

may dictate. Their personal discretion is a myth. Members who belong to the same political party as the ministers are under a definite and well-recognized obligation to support every measure that the ministry brings in. To do otherwise is to desert their own party under fire and to be branded as renegades. Such desertions do take place on occasions but they are altogether exceptional and they are contrary to the spirit of parliamentary government.

The English system of government is full of fictions. One of them is the fiction that a member of the House of Commons obeys the will of his constituency. What he really obeys is the instruction of his party leaders. Another myth is that the House of Commons controls the ministry. In reality the ministry, once it has been put into office, controls the action of the House. The gist of the English parliamentary system may be stated in this way: the voters, at the polls, choose between the programs of the respective political parties; they place one party in power and the other in opposition; the party which is placed in office then takes control of the executive, and the executive dominates the legislature. The actual result is to make the prime minister the controlling factor in both branches of government.<sup>1</sup>

Some  
myths of  
English  
government.

By way of contrast the most distinctive feature of congressional government is the independence of the individual member. The American congressman is a partisan; he is nominated as the candidate of a political party; he is elected with its aid; and he calls himself a supporter or opponent of "the administration." But he is not a supporter or opponent in the English sense. He is under no obligation, express or implied, to support or to oppose every measure that may come to Congress with the endorsement of the White House. On the contrary he will not hesitate to vote against a measure which is championed by the leaders of his own party if he feels that it is against the interests of his own congressional district, or the sentiment of his own constituents. Those who have grown up under a parliamentary system of government find this hard to understand; but it is a condition of things that follows logically from the American

The  
American  
congress-  
man a  
relatively  
free agent.

<sup>1</sup> This is not true, of course, where the election has been indecisive and has put into office a prime minister whose tenure depends upon the support of a party other than his own.

doctrine of divided powers. It has defects, but it also has advantages.

The  
deluge  
of laws.

Congress, in the exercise of its powers, enacts far too many laws. So do the state legislatures. There are said to be about two million laws and ordinances at present effective in the United States, or supposed to be in effect. This is a mere guess, however, for nobody has ever counted them all. But even if you cut the figure in two it is ten times as many laws as we need, and twenty times as many as are actually enforced. The enacting, revising, and amending of laws has become a great national industry. Statutes fly from forty-nine legislative capitals in the United States like sparks from so many anvils. Our legislators have entirely forgotten that it is more blessed to repeal than to enact.

Laws beget laws. Give a statute time and it will have its own progeny. The increase is like that of micro-organisms, by geometrical progression. The Fathers of the Republic foresaw the dangers of over-legislation and desired to guard against it. "It will be of little avail to the people," wrote one of them in the *Federalist*, "that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow."

We have long since passed this stage. Our laws are too voluminous to be read, too incoherent to be understood, and often too absurd to be enforced. No man who knows the law to-day can guess what it will be to-morrow. He can only be sure that to-morrow it will be different from what it is to-day. When one keeps from violating the law (the traffic ordinances, for example) it is good luck more often than good will that he has to thank for it.



## CHAPTER XVI

### THE TAXING POWER

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.—*Chief Justice Marshall in McCulloch v. Maryland* (1819).

Of all the prerogatives that can be lodged in any government, the taxing power is the most important. When Chief Justice Marshall spoke of the power to tax as the "power to destroy," he meant that this great economic weapon, if unrestrained, might be used by a government to destroy any form of business or to wipe out any form of property. It is a power, nevertheless, which in some form or other every government must possess. No government can exist without income, and taxation is the natural source of governmental income. The Articles of Confederation gave no power to tax, and that is the chief reason why the Confederation tottered. It was chiefly to create a taxing power that the Fathers assembled at Philadelphia in 1787. The Union was born of the desire for a central authority with an assured income. It is appropriate, therefore, that the authority "to lay and collect taxes, duties, imposts and excises" should stand first among the eighteen enumerated powers of Congress.

A tax may be defined as a burden or charge imposed by a legislative authority upon persons or property to raise money for public purposes. Taxation, accordingly, is simply the taking of private property for public use under conditions determined by law. The only difference between modern taxes and the predatory exactions of tyrannical times is that modern taxes are levied upon the people by action of their own representatives

Importance of the power to tax.

Definition of a tax.

and in accordance with certain principles which aim to insure a fair adjustment of the burden.

Essentials  
of a good  
tax.

Nearly one hundred and fifty years ago the greatest of political economists, Adam Smith, laid down four rules or canons which ought to be observed in the levying of taxes, and these rules, despite great changes in both economic and political conditions, are recognized as sound at the present day. Smith's canons of taxation may be briefly summarized as follows: that the citizens of a state should be taxed according to their ability to pay; that taxes should be certain, not arbitrary; that they ought to be "levied at the time and in the manner which is most likely to be most convenient for the contributor to pay"; and, finally, that taxes should be so contrived as to take out of the pockets of the people as little as is possible above what is actually needed by the public treasury.<sup>1</sup>

Taxes are :  
(a) com-  
pulsory.

Taxes differ from most other payments in two respects. First, they are compulsory. No one need pay interest, rent, wages, or prices unless he bargains to do so; but the payment of taxes is not the result of any bargain. Taxes are levied without any reference to the initiative or wishes of the individuals upon whom they fall, except, of course, in so far as these individuals by their votes may have an influence in determining the general taxing policy of the government. Second, taxes are not payments made to the government by individuals and corporations in return for services rendered. The man who rides a hundred miles on a railroad pays twice as much as one who goes half that distance, because he gets twice as much for his money. But the man who pays a thousand dollars in taxes does not get twice as much in benefits from the government as the one who pays only five hundred dollars.

The basis  
of taxation  
is not  
individual  
benefit.

Nearly all payments that we make are in the form of a *quid pro quo*; they are in proportion to the benefits which we receive. This is the case with payments for all forms of goods or services—the one great exception is the payment of taxes. Taxes have no direct relation to benefit; those who pay very little in taxes, either directly or indirectly, sometimes receive a large return in the form of public services. Take, for example, the taxes that support the public schools. The fact that a wealthy man has no children, or prefers to send his children to a private school,

<sup>1</sup> *The Wealth of Nations*, Book v, ch. ii, pt. ii.

does not relieve him of the obligation to pay his full share of what public education costs the community. On the other hand, a man whose contribution in taxes is very small may send a dozen children, one after another, through the public schools without any extra cost.

It would not be possible to base taxation upon individual benefit, because there is no way of knowing how much benefit each individual receives from the government's work. Do some individuals, for example, obtain more benefit than others from the maintenance of law and order or do all derive alike? Who gets the greater benefit from clean streets, the rich man who drives his motor car over them, or the poor man whose children use the streets as a playground? Taxes could not be adjusted to service. Even if they could be so proportioned, it would be unwise to do so. The general interest requires that everyone should enjoy the benefits of police protection, the public schools, the parks, the playgrounds, whether he is able to pay for them or not. So taxes are levied in order to pay for these things by simply putting the heaviest burden in the first instance upon those who are best able to pay it, letting them shift it if they can.

Why taxes cannot be adjusted to service.

Taxes are of various sorts and may be classified in several ways. According to their purpose, taxes may be divided into two kinds, fiscal and regulative. The former are levied with the sole purpose of securing revenue; the latter are imposed, either in whole or in part, to bring about certain social or economic changes, and without prime regard for their value as revenue producers. The general property tax is the best example of taxation for purely fiscal purposes, while tariff duties may be regarded as regulative in character, designed to promote industry at home. Surtaxes on large incomes, and taxes on inheritances, are also regulative in the sense that they aim, among other things, to reduce the size of swollen fortunes. Taxation may, of course, be both fiscal and regulative, and most taxes are both to some extent.

Classification of taxes:  
1. According to purpose: fiscal and regulative.

Another classification of taxes is based upon their assumed incidence or final resting place. Direct taxes, such as taxes on land and poll taxes, are supposed to rest finally upon those who pay them in the first instance; while indirect taxes, such as customs duties and excises upon tobacco, are laid upon the

2. According to incidence: direct and indirect.

importer or the manufacturer with the expectation that they will be shifted to the shoulders of the ultimate consumer. These suppositions, however, are not always in accordance with the facts. Even direct taxes are occasionally shifted, while indirect taxes under some circumstances remain where they are placed. For this reason the classification of all taxes into two categories, direct and indirect, is not a satisfactory one from the standpoint of the economist. In political science and in actual legislation, however, this distinction between direct and indirect taxes has been of great importance, particularly in the United States.

3. Accord-  
ing to  
subject.

The chief taxes levied in the United States to-day, whether fiscal or regulative, direct or indirect, are taxes on property, taxes and surtaxes on the net incomes of individuals and corporations, taxes on the capital stock of corporations, taxes on inheritances, duties on imports, excises on tobacco and on various luxuries, business taxes, stamp taxes on legal documents and taxes on the sale of stock-exchange securities, franchise taxes on public utilities, and poll taxes on persons. The national government is permitted by the constitution to levy taxes in all these forms, but it has not more than fifty years made use of the first or the last, both of which (being direct taxes) would have to be apportioned among the states according to their respective populations. It has drawn its revenues from indirect taxation.

Limita-  
tions on  
the taxing  
power of  
Congress :

1. Taxes  
must be  
levied  
for a  
public  
purpose.

But although the taxing power of Congress is extensive in scope, it is by no means unlimited. Restrictions of various sorts are provided in the constitution. The first of these limitations relates to the purposes for which taxes may be imposed. Congress may levy taxes only in order "to pay the debts and provide for the common defense and general welfare of the United States." That, to be sure, is not a stringent limitation, for nearly every tax that Congress desires to levy may be brought within the broad confines of "general welfare." This general welfare clause, it should be emphasized, is not a grant of legislative authority to Congress, as some people seem to think; it is merely a limitation upon the taxing power. You will hear people, even very intelligent people, assert from time to time that Congress ought to do this or that (prohibit child labor, for example) under "the general welfare clause of the constitution."



The general welfare clause does not convey authority; it limits authority.<sup>1</sup>

In various forms the question as to what is a "general welfare" purpose has been presented to the courts for interpretation. May taxes be imposed in order to pay bounties to growers of sugar beets or some other commodity which Congress desires to encourage? In such matters the courts have held that incidental private benefits do not preclude the main purpose from being public. Rarely, therefore, have tax laws been declared invalid on this account.

In the second place, the constitution requires that all duties, imposts, and excises imposed by the authority of Congress shall be uniform throughout the United States. This does not mean, however, that all the states must contribute equally. Congress, in the exercise of its discretion, may adjust the burden of national taxation so that more will fall upon one area or section of the population than upon another. A tax on tobacco is not void for want of uniformity because tobacco happens to be grown in some states of the Union and not in others. Uniformity, within the meaning of the constitution, implies that the tax must bear with equal weight wherever the subject of the tax is found. For example, a tax upon alien immigrants has been held to be uniform despite the fact that more than ninety-five per cent of it is collected at the port of New York. On the other hand, a tax would not be uniform if it should make discriminations between the same things in different parts of the country; for example, if it should be levied upon the inheritances at one rate in some states and at a different rate in others. When customs duties are collected, to give another illustration, the rates upon any class of commodities must be the same at all ports of entry. No preference may be given by any regulation of commerce or revenue to the ports of one state over those of another.

2. Taxes must be uniform.

<sup>1</sup> "Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the constitution, on the language in which it is defined. It has been urged and echoed, that power 'to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction."—*The Federalist*, No. 41.

3. No tax  
may be laid  
on exports.

A third limitation upon the taxing powers of Congress relates to exports and to internal tariffs. "No tax or duty," declares the constitution, "shall be laid upon articles exported from any state." Congress may not, therefore, tax the exports which go from the United States to foreign territories. It may tax imports only. The restriction upon the states is even more rigid, since a state cannot, without the consent of Congress, impose taxes upon either imports or exports under any circumstances whatever. In this connection the insular possessions, such as Porto Rico and the Philippines, have been held to be neither states nor foreign territory, hence trade between the United States and these islands may be subjected to taxation by Congress. In one of the famous Insular Cases the Supreme Court held that Porto Rico, upon its cession to the United States, ceased to be foreign territory, but did not thereby become incorporated into the Union.<sup>1</sup>

Reason for  
this rule.

The prohibition of any tax upon exports was one of the compromises of the constitution. It was a concession to the southern states, which were at that time large exporters of rice, tobacco, and similar staples. The current economic notion of the day was that export duties always fell upon the exporter, while duties on imports fell upon the consumer. Hence the southern delegates were firmly opposed to giving Congress any right to impose export duties which would fall wholly upon the planters, and in the end they had their way. In some respects, however, the restriction has proved unfortunate. It has deprived Congress of a means whereby the depletion of natural resources might have been slackened. Exports of timber amounting to many millions per year have gone forth untaxed. It should be noted, however, that the prohibition of taxes on exports does not restrain Congress from regulating export trade in any reasonable way otherwise than by taxing it. Nor does it exempt goods from the payment of ordinary internal taxes merely because they are being manufactured for export.

Its unfor-  
tunate  
influence.

As regards duties on imports, Congress has full power. It may levy import duties of any sort and at such rates as it may determine, provided of course that the rates are uniform at all ports where the goods come in. This power to tax imports has been continuously used by Congress, as everyone knows, since

<sup>1</sup> 183 U. S. 151.

the establishment of the Republic. It is the basis of the long succession of American tariffs.

A fourth constitutional limitation on the taxing power of Congress relates to the imposition of capitation and other "direct taxes." Congress has power to levy direct taxes whenever it may see fit, but the total amount of the levy must be 'apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.'<sup>1</sup> In other words, direct taxes must be distributed throughout the Union according to population, not according to wealth, income, or area. This is a provision of the original constitution, somewhat modified by the fourteenth amendment.

But what are "direct taxes" within the scope of this restriction? At the time the constitution was adopted it seems to be taken for granted that the only direct taxes were poll taxes and taxes on land. Taxes of every other sort were regarded as indirect taxes. Ten years later the Supreme Court affirmed this idea in a decision which declared that a tax on carriages was not a direct tax; that capitation taxes and taxes on land were the only forms of direct taxation; and that all other taxes were included within the comprehensive phrase "imposts, duties and excises."<sup>2</sup> Three of the four justices who heard the arguments in this case had been members of the constitutional convention. "As all direct taxes must be apportioned," said one of the justices, "it is evident that the constitution contemplated none as direct but such as could be apportioned." Congress later levied taxes upon bank circulation, on the receipts of insurance companies, and on inheritances: but it did not regard these as direct taxes and hence made no provision for apportioning them. All these taxes were contested as unconstitutional, but the Supreme Court held that none was a direct tax and hence that none needed to be apportioned.<sup>3</sup>

Finally, in 1862, under the stress of heavy demands for war revenue, Congress proceeded to lay taxes on incomes, without provision for apportionment. Then, for the first time, arose

4. Direct taxes must be apportioned.

What are "direct taxes" in this sense?

Some examples of early taxes not held to be "direct" taxes.

<sup>1</sup> Amendment XIV, Section 2.

<sup>2</sup> *Hylton vs. United States*, 3 Dallas, 171.

<sup>3</sup> *Veazie Bank v. Fenno*, 8 Wallace, 533; *Pacific R. R. Co. v. Soule*, 7 Wallace, 433; and *Scholey v. Rew*, 23 Wallace, 331.

The income tax controversy: its various stages.

1. The income tax law of the Civil War period.

2. The income tax law of 1894.

3. The sixteenth amendment, 1913.

the question whether an income tax was a direct tax. After reviewing its attitude in previous cases relating to the taxing power of Congress, the Supreme Court unanimously decided that an income tax was not a direct tax, declaring categorically that the only direct taxes, within the meaning of the constitution, are poll taxes and taxes on real estate.<sup>1</sup> This decision was not given for many years after the passage of the civil war income tax law in 1862, and indeed not until after it had been repealed.

This decision, unequivocal as it was, might have been assumed to settle the matter forever, but in due course it was revived,—and was answered in a different way. Congress in 1894 found itself once more in urgent need of money and passed a new income-tax law imposing a levy of two per cent on all incomes above four thousand dollars from whatever source derived. This law was promptly attacked as unconstitutional because it taxed the income from land, which was in effect to tax the land itself. The Supreme Court, after two hearings, upheld this contention that a tax on the income from property constitutes a tax on the property itself, and accordingly that a tax on such income must be held to be a direct tax.<sup>2</sup> A tax on land, the court pointed out, was admittedly a direct tax, and a tax upon the income of land is not distinguishable on any broad principle from a tax on the land itself. Like a tax on land, therefore, it is required to be apportioned and the law of 1894 was held to be unconstitutional for not having done this. Thus, by a close decision, in which four out of the nine justices dissented, the court reversed the ruling which it had made on the nature of income taxes fourteen years before. From 1895 to 1913, accordingly, Congress was not able to enact an income tax law without providing for an apportionment among the states. To have apportioned an income tax according to population would have been highly inequitable, since population and income do not bear any fixed ratio to one another. Massachusetts, for example, contains a smaller population than Texas, but a much larger amount of taxable income.

This legal obstacle was finally removed, however, in 1913, when a sufficient number of the states gave their assent to the

<sup>1</sup> *Springer v. United States*, 102 U. S. 586.

<sup>2</sup> *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429; 158 U. S. 601.



sixteenth amendment, the adoption of which was in effect a reversal of the Supreme Court's decision on the law of 1894. This amendment provides that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the states and without regard to any census or enumeration." Shortly after the adoption of the sixteenth amendment a new federal tax upon incomes was imposed, and this tax, which is now collected directly by the federal authorities, brings in a considerable share of the nation's income. The power of Congress to levy upon incomes, without apportionment is now beyond question; but this does not mean that no income tax law can henceforth be held to be unconstitutional. The constitution provides, for example, that the salaries of judges "shall not be diminished during their continuance in office" and gives a somewhat similar protection to the salary of the President. Notwithstanding the provision that Congress may tax incomes "from whatever source derived," the Supreme Court has held that a tax on the income of a federal judge is, in effect, a diminution of his salary and hence not permissible. In other words the court has taken the ground that the sixteenth amendment did not intend to abolish the independence and security which the constitution gives to the federal judiciary and to the chief executive.

4. The  
income  
tax law.

All of the foregoing limitations as to the purpose and methods of national taxation are expressly laid down in the constitution. In addition, there is an implied limitation arising out of the very nature of the federal union, and one that is deemed necessary to the continued free working of the state governments. If the states are to be secured in the full enjoyment of their reserved powers, Congress must not be permitted to clog their governmental machinery by taxing it to a standstill. For let it once be admitted that Congress may tax the mechanism through which the state performs its functions and the supremacy of Congress over the states would soon become established. Over one hundred years ago it was decided by the Supreme Court that no state could tax the instrumentalities of the federal government, such as post-offices, custom-houses, or the notes of national banks. This decision was based upon the principle that the various states, if given authority to tax the mechanism of federal administration, would possess the power to stop its

Implied  
limitations.

May  
Congress  
tax the in-  
strumental-  
ties of  
a state?

wheels entirely. But the principle works both ways; it protects the states against the nation as well as the nation against the states. In spite of the sixteenth amendment, with its power to tax incomes from "whatever source derived," Congress does not tax the revenue of a state or the salaries of its officers. It is for this reason that a teacher in a state university pays no federal income tax on his salary (for he is technically a state official) while all teachers in endowed universities are subject to the tax, being rated as ordinary employees.

The case  
of state  
and  
municipal  
bonds.

May Congress levy a tax upon the income of an individual which is derived from the ownership of state and municipal bonds? Ohio, for example, desires to borrow money for public purposes. It issues bonds bearing interest at four per cent. An individual buys a hundred thousand dollars' worth of these bonds, and they yield him an income of four thousand dollars per year. May the national government tax this income? Or his income from bonds of a county, city, town, school district, or other subdivision of a state?

The answer to this question is still in doubt. It has not yet been definitely before the Supreme Court for the reason that Congress has thus far refrained from any attempt to tax incomes derived from state and municipal bonds. On the other hand the states and municipalities have not attempted to tax the income from bonds issued by the nation or even bonds of institutions (like the federal farm loan banks) which Congress has declared to be exempt. The result is that we have a huge mass of tax-exempt bonds yielding incomes to private investors. When a wealthy individual seeks to escape the imposition of surtaxes on his large income he need only transfer his investments into these tax-exempt securities. And this is what large numbers of rich individuals do. Consequently it is proposed to amend the national constitution by providing for the taxation of income from all future issues of public bonds, whether by the nation, the states, or the municipalities. A serious evil in the present situation arises from the fact that tax-exempt bonds are so strongly favored by investors that they sell readily at low rates of interest. This encourages public borrowing, even wasteful public borrowing. It draws funds out of industry and productive enterprises. It compels the private borrower to pay higher rates for the loan of money than would otherwise be the

case. There is much to be said for making an end to these exemptions.

Two widely-held impressions concerning the nation's power to tax have no basis in law. The first is the popular idea that double taxation is unconstitutional, that the same thing must not be taxed twice. There is nothing in the constitution to prohibit double taxation; the same income can be taxed by both national and state governments. So may the same inheritance. An inheritance, indeed, may be taxed three or four times—by the federal government, by the state in which the decedent lived, by the state in which the heirs live, and by the state in which the inherited property is located. Double and triple taxation may be unjust and unwise; but it is not unconstitutional and never has been.

The other widespread but erroneous idea is that there must be "no taxation without representation." This is perfectly good political philosophy, but it has no validity as a legal principle. The nation and the states may tax people without giving them representation; there is nothing in the constitution that forbids them to do so. The people of the District of Columbia, for example, are subject to taxation like those in the rest of the country, yet they elect no local government, they are not represented in either House of Congress, and they have no voice in the election of the President. A few years ago the Supreme Court, in a controversy which involved this question, unanimously decided that Congress has an undoubted right to tax without granting representation.<sup>1</sup>

These, then, are the limitations imposed by the constitution upon the taxing power of Congress. Now as to the way in which the power is actually exercised. It was assumed by the framers of the constitution that Congress would frequently levy direct taxes and apportion them among the states, but this source of federal revenue has proved far less important than was anticipated. On only five occasions has Congress levied direct taxes: once in 1798, three times during the War of 1812, and once during the Civil War. In each case Congress set the total amount to be raised and then allotted to each state its due proportion according to its population. In each case also, Congress specified the subjects upon which the tax was

Two popular errors:

1. Concerning "double" taxation.

2. Concerning taxation and representation.

How Congress has exercised its taxing powers.

1. Direct taxes.

<sup>1</sup> *Heald v. The District of Columbia*, 259 U. S. 114.



to be levied. Lands and slaves were the subjects taxed by the earlier laws, while the act of 1861 laid a direct tax upon land alone. The southern states refused to pay this levy. No direct tax has been apportioned among the states during the past sixty years.

2. Excises  
of all  
sorts.

At all times since its establishment the national government has depended for the bulk of its revenue upon indirect taxes, particularly upon customs duties, excises, and more recently upon inheritance taxes and taxes levied upon the net earnings of individuals and corporations. Until after the beginning of the twentieth century the proceeds from import duties and excises formed the most important source of national income. Then, after 1909, the taxes on corporations began to figure in the returns, and after 1913 large increments of revenue were obtained from income taxes on individuals. In 1916, the year before the United States entered the war, the national revenue from taxation was about seven hundred millions, of which the import duties contributed considerably less than one-half. The other sources of revenue had become the more lucrative.

The  
war  
taxes.

In April, 1917, when the United States declared war upon the German government, the certainty of huge military expenditures necessitated a general revision of the tax laws. It was not deemed to be just or expedient that all the funds needed for carrying on the war should be raised by borrowing. Hence Congress, by a series of war revenue measures, not only extended and increased some of the existing taxes but resorted to new forms of federal taxation as well. The excises on tobacco were raised, while many new excises were imposed,—for example, upon telegrams, railroad and Pullman tickets, jewellery, soft drinks, automobile sales, certain legal papers, and so forth. The rates of taxation, both upon corporations and the net income of individuals, were much increased. A tax upon excess profits, that is, upon all business profits above a certain point, was levied for the first time in American history. By these various tax measures the nation's normal income was many times multiplied. After the war had come to an end some of these taxes (notably the excess profits tax) were abolished, but others (e.g. the excises on automobile sales) have been retained. The rates levied upon the net incomes of individuals have also been somewhat reduced although they are still higher than they



were ten years ago. Some national revenue is obtained from sources other than taxation, but not a relatively large amount.

This great widening in the area of federal taxation means that both the nation and the states are now deriving a good deal of their revenue from the same sources. The taxing powers of the states clearly overlap those of Congress, for the states are at liberty to tax practically anything except imports, exports, the instrumentalities of interstate commerce, and the agencies of the federal government. Many states now have inheritance taxes and taxes upon corporations, while some have income taxes. In fixing their respective rates the nation and the states pay very little heed to one another. Each regards its own necessities. This is unfortunate from the citizen's point of view because the cumulative burden falls on him. The taxation of property, incomes, or inheritances ought to be planned as a whole and not left as a hostage to the needs of several public bodies. Competition for revenues between two different authorities, each of which endeavors to gather all it can from the same sources, can hardly ever be made the basis of sound public financing.

The widening field of federal taxation.

Not all this extension of federal taxation has been due to the need for more revenue. The corporation and income taxes were levied before the huge expenditures on military account began. These taxes, along with the inheritance tax, have had in view, to some extent at least, the readjustment of the entire national tax-burden, so that a larger portion of it may be borne by the well-to-do than was the case in the earlier days when customs duties furnished the bulk of the revenue. The high customs duties were spread upon the whole population in the form of higher prices. The rich, being larger purchasers, doubtless paid more taxes than the poor, but not proportionately. The excises on liquors and tobacco, moreover, fell chiefly upon the masses of the people and not upon the well-to-do. To-day, all this is being changed. The income tax, with a rate which becomes higher as the size of the income increases, is assumed to adjust itself to the financial resources of each individual citizen. The inheritance tax also represents an endeavor to make wealth rather than population the measure of taxation. Taxation, in a word, is becoming not only a means of raising money for public use, but of compelling such economic reconstruction

Federal taxation as a weapon to compel economic readjustments.

as Congress thinks desirable for American society as a whole. Many people believe that "swollen fortunes" are an evil in a democracy. The inheritance tax is one agency for reducing them; the income surtax is another. Many other federal taxes have social rather than purely revenue motives in view. The attempt to put a national tax on the products of child labor was not prompted by the need for revenue but by a desire to stop the employment of children in industries.<sup>1</sup>

The  
future of  
taxation.

The future of national taxation ought to have a word because certain features of congressional policy in this field are now becoming clear. It is unlikely that tariff duties will hereafter contribute so large a proportion of the total revenue as in the old days. The adoption of the eighteenth amendment has deprived the national treasury of large sums which it formerly obtained from liquor excises. On the other hand, there will be a continuing need for large sums to pay interest upon the billions of war bonds, to provide pensions, and to carry on the steadily-expanding work of the national government. Where is all this revenue to be had? If the signs of the present day are not misleading, we may reasonably look for the continuance of heavy taxes on incomes and inheritances. Possibly there may be a resort to a sales tax, or excise on all retail sales of merchandise, such as President Harding advocated in 1922; but this form of taxation would be widely unpopular and would hardly be resorted to until after other sources of revenue had been utilized to their full capacity. And as a last resort, the national government could tax land and buildings by apportioning the total amount among the states according to their respective populations.

The need  
for public  
education  
in tax  
matters.

On no subject in the field of applied economics is there so much murkiness in the public mind as on this question of taxation. On none is there so much loose thinking. It is taken for granted by millions of men that a tax stays wherever you put it, that when you tax the rich, the rich pay it. In other words, they pay little or no heed to the ultimate "incidence" or final resting-place of the tax. They imagine that when you lay taxes upon railroads, the owners pay it from their own pockets, and that when you tax the banks it is only the bankers that have to worry. Now nothing could be farther from the truth.

<sup>1</sup>For the outcome of this attempt, see *below*, pp. 309-310.

The railroad owners and the bankers are only the middlemen; they pay the taxes in the first instance and then collect them, every dollar and more, from passengers, shippers, borrowers, and customers. Practically all taxes, of whatever sort, percolate into the cost of living. There is no such thing as a nontaxpayer—at any rate not outside the prisons and poor-houses. Everybody who smokes, pays taxes. What he smokes indeed is mainly taxes, not tobacco, because at least half the cost of this commodity is often made up of contributions to the purse of Uncle Sam. The government, of itself, produces no income. The government lives off the earnings of the country, the whole country. It is folly to let ourselves be deluded in this matter. It is supreme folly because nine-tenths of our extravagance in government is due to the delusion that the majority of the people do not have to pay for it. It is right here, more than anywhere else, that an elementary truth ought to be hammered into the heads of the American people.

The work of collecting the national revenue is in the hands of the secretary of the treasury, but is chiefly performed by two agencies in his department, namely, by the division of customs and the internal revenue service. For the collection of duties upon imports the country is divided into customs districts, each with a main port of entry in charge of a collector or deputy collector of customs. For the collection of internal revenue taxes the country is divided into a larger number of similar areas, each also in charge of a collector. The work of these collectors of internal revenue includes not only the levy of the regular excises, but the collection of the corporation and income taxes as well. The assessments upon which corporation and individual income taxes are levied depend, in the first instance, upon sworn declarations which must be filed by every corporation, partnership, or individual who is liable to taxation. Incomes of business corporations and of individuals below a designated sum are exempt. All collections are turned into the general treasury of the United States.

The accounts of every officer who has to do with the collection of the revenue are regularly audited by officials of the general accounting office, which was established by the provisions of the Budget and Accounting Act of 1921 under the headship of a comptroller general. This official is appointed by the President

Collecting  
the  
revenue.

Accounts  
and  
audits.

with the approval of the Senate, for a fifteen-year term. The general accounting office is independent of all departments and responsible to the President alone, thus ensuring impartiality in the conduct of its work. This work of auditing, it need scarcely be added, is of huge dimensions because almost every bureau or office in all departments of the government is receiving money from some source—in fees, charges for patents, copyrights, steamboat licenses, fines in the federal courts, proceeds from the sale of property, or confiscated merchandise, and so on. The general accounting office, as will be pointed out later, is also entrusted with the work of auditing all payments made out of the national treasury.<sup>1</sup>

<sup>1</sup>There is no volume which deals with American national taxation in a comprehensive way although such a book is much to be desired. But material relating to various phases of the subject may be found in such works as E. R. A. Seligman's *Essays in Taxation* (9th edition, N. Y., 1921), C. C. Plehn's *Introduction to Public Finance* (4th edition, N. Y., 1920), M. H. Hunter's *Outlines of Public Finance* (N. Y., 1921), H. G. Brown's *Economics of Taxation* (N. Y., 1924), J. P. Jensen's *Problems of Public Finance* (N. Y., 1924), H. L. Lutz's *Public Finance* (N. Y., 1924), and D. R. Dewey's *Financial History of the United States* (2d edition, N. Y., 1920).



## CHAPTER XVII

### THE NATION'S EXPENDITURES

A scrupulous care for finance underlies the foundation, not merely of an honest character in individuals, but of honest and efficient government. A disregard of it has scattered distress and want, caused rebellions, and led to the collapse of great nations.—*The Federalist*.

Twenty years ago (1905) it cost only six hundred million dollars to run the nation's government for twelve months; to-day it costs more than three billions. In 1905 the expenditures of national government amounted to only seven dollars for every man, woman, and child in the country; to-day they amount to thirty dollars. Here is a four-fold increase in two decades. The war was not responsible for all of this increase. Interest on the war debt amounts to less than a billion per annum; so how is the other billion-and-a-half to be explained?

The explanation is not difficult. It can be epitomized in the statement that *all government is conducted, in any progressive country, under the law of increasing costs per capita*. In other words, the more populous and the more civilized a country or a community becomes, the larger is the cost of government for every unit in its population. National greatness is always an expensive luxury. It might be thought, offhand, that when a country does things on a larger scale it would be able to do them more cheaply; but this is never the case. An army of ten thousand men costs so much per man. Will an army of a hundred thousand men cost less than ten times as much? Not at all; it will cost more than ten times as much. Multiply its size by ten once more, and give the country an army of a million men. The cost will increase far more than tenfold, yes, more than twenty-fold. The bigger your army the more varied and costly its technical services. And so it is with every branch of public activity. The greater the scale on which things are done by a government, the larger the cost per unit.

The  
rising  
cost of  
govern-  
ment.

The  
reasons  
for it :

1. The  
law of  
increasing  
costs.

Every year the national government is called upon to expand old functions and to render new services—in the field of agriculture, education, public health, child welfare, and what not. Each new service involves a very small outlay at the start, perhaps only a million or two. It seems such a small item in a budget of three thousand millions that Congress dislikes to deny the request. Then the new service begins to grow like a sycamore tree; it sends its branches out in all directions, and its roots must have more sustenance. The little million waxes into ten, twenty, fifty millions within a few years. There are few things more voracious than a new government bureau, division, or office.

2. The  
war  
stimulus.

A war, again, always gives a sustained momentum to governmental expenditures. Under the stimulus of a war emergency every department of a government expands in all directions. No heed is paid to the cost, for the war must be won at all costs. The expectation is, of course, that when hostilities are ended there will be a general deflation to the old levels. But that never happens. It is far easier to put names on the public payroll than to get them off again. The soldiers are willing to be demobilized but those who have been enrolled in the new army of civilian officeholders are not. The pressure against a return to normalcy comes from every quarter, political and personal.

The chief  
items in  
national  
expendi-  
ture:

It may be of interest to summarize, very briefly, the chief items in the national expenditure at the present time. Interest on the national debt is, of course, the largest single item and takes nearly a billion dollars a year. The army and navy, put together, cost about half a billion. Military and naval pensions, and the activities of the veteran's bureau, cost a half billion more. So there is two billion dollars chargeable to war, preparations for war, and the aftermath of war! Those three letters, W-A-R, give the key to more than 65 per cent of the national expenditures. "Too much taxes," growl the American people. But why too much taxes? One does not have to be a pacifist to discern the answer. War may be a biological necessity, as German philosophers were fond of arguing some years ago, or it may be a tragedy which nations cannot hope to escape. But it is in any event the greatest waster of wealth that humankind has ever devised. The United States, although happily more free from wars than most of the larger European

1. War  
and its  
concomi-  
tants.

countries during the past hundred and thirty-seven years, has spent more money on war, directly and indirectly, than on all other governmental activities put together.

In the total yearly expenditures of today, therefore, less than a billion dollars are devoted by the United States to strictly civil purposes. The largest single item is represented by the cost of the work done by the department of agriculture; the rest goes for the expenses of Congress, the executive departments and the courts, for the erection and maintenance of public buildings, for aid to roadbuilding, for the foreign service, for government regulation of all sorts, and for a host of miscellaneous services. The maintenance of Congress costs only twelve or thirteen cents per head of population; the work of the department of labor costs only about five cents per capita. But the cost of maintaining the veteran's bureau, in 1924, was no less than three dollars per capita.

How is the allotment of this money to various purposes determined? It has long been a fundamental principle of popular government that no public money shall be spent except after authorization by the representatives of the people. Accordingly it is provided in the constitution of the United States that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The first essential step in all national expenditure is, therefore, that Congress shall make an appropriation in the form of a law. These appropriation laws are often elaborate affairs with thousands of items. In printed form they may fill as many as a hundred pages in the statutes-at-large. Before an appropriation bill is submitted to Congress, however, there are some preliminary steps which should be indicated.

Most of the functions of national government (such as the maintenance of the army, the navy, public works, the administration of justice, and so on) are in the jurisdiction of some executive department. Each of these departments, therefore, must first make an estimate of the amount of money that it needs for the ensuing year. The same is true of all the boards and bureaus and services that are outside the jurisdiction of the regular departments. Prior to 1920 they all sent their figures to the secretary of the treasury who made up his own estimates of probable revenues and turned the whole thing over to

2. The peaceful activities.

How appropriations are authorized.

The estimates.

The old  
plan of  
considering  
them.

the Speaker of the House. Then the Speaker distributed the estimates, by groups, to various committees, eight or nine of them—the committee on military affairs, on post offices, and so forth, each getting the estimates in its own field. These various committees then reviewed the estimates as submitted to them and brought into the House appropriation bills based upon their own conclusions as to what ought to be voted. Each of these committees did its work independently. No one of them knew what the others were doing. One might be trying to economize while another was cutting loose with extravagance. Congressmen argued that the work was too heavy for any single committee to perform and that eight or nine specialized committees could do it better than one general committee on appropriations.

So the United States remained, until after 1920, the only great country without a unified budget system. Proposals to spend money came at every session from a multitude of sources; it was everybody's business to encourage spending and nobody's job to discourage it. Under this system the national expenditures naturally kept soaring year after year and Congress acquired the reputation of being the world's greatest spendthrift. But so long as a large amount of revenue kept coming in, chiefly from the proceeds of the protective tariff, it was hard to impress the country with the need for a system which would promote economy.

Why it  
broke  
down.

The world war put a different face on things. The expenditures in 1917-1919 became so tremendous that some system of centralized control seemed absolutely essential. For many years the reformers had been urging the establishment of a unified budget system but their arguments did not count for much until the nation found its tax rates doubling and trebling at a stroke. Then the cry for "economy and efficiency" resounded from all corners of the land and Congress responded in 1920 with the passage of a budget bill which President Wilson vetoed because it contained one highly objectionable provision.<sup>1</sup> Next year, however, the measure was re-enacted with this provision eliminated. It was signed by President Harding and is known as the Budget and Accounting Act of 1921.<sup>2</sup>

<sup>1</sup> A provision that a certain official should be immune from removal by the President.

<sup>2</sup> W. F. Willoughby, *The Problem of a National Budget*.



Since the passage of this act the method of voting the appropriations is as follows: Each department, or bureau, or board, makes up a statement of its financial needs, as formerly. These estimates, which are based upon the expenditures of the previous year, are then forwarded to the director of the budget, an official appointed by the President, without confirmation by the Senate, and without any fixed term of office. The director of the budget thereupon compiles the figures, after conferences with the heads of the various departments, into one large document. He has no legal power to require that any estimate shall be reduced before it goes into the budget, but he can try to persuade the head of a department, and if the President is staunchly behind the director, the persuasion is likely to be effective. Likewise the director of the budget compiles a table showing the estimated receipts for the year, including income from existing and proposed taxes. All these figures, when put together, form the "budget" or plan of financing for the fiscal year. The whole thing, with any recommendations which the director of the budget may choose to make, is then transmitted to the President, who sends it to Congress. In transmitting the budget to Congress the President may accept the director's suggestions or may add recommendations of his own. In a word, therefore, the executive branch of the government is now vested with the initiative in planning the financial policy of the nation.

Procedure under the new budget system:

1. executive action.

Now comes the next step. The House receives the budget from the President. Without debate it is referred to its committee on appropriations, which consists of thirty-five members.<sup>1</sup> This committee, in turn, refers the various groups of items to its own sub-committees for study. The sub-committees work upon the figures and, whenever necessary, call in the various executive officials to explain their respective estimates. After this consideration of the estimates has been completed, various appropriation bills are drafted by the sub-committees and reported to the general committee on appropriations, which in turn lays the bills before the House for adoption, amendment, or rejection.

2. legislative action.

1918). The text of this act can be found in the appendix to W. F. Willoughby and Lindsay Rogers, *Introduction to the Problem of Government* (N. Y., 1921).

<sup>1</sup> Twenty-three are chosen from the majority party in the House, and twelve from the minority.

Supple-  
mentary  
and  
additional  
appropria-  
tions.

Not all the national expenditures for the year, of course, can be embodied in a single budget. In preparing their estimates, some things are always overlooked by the various departments no matter how careful they may try to be. No official, however capable or experienced, can foresee all the needs of his department for a whole twelve months in advance. Hence the departments are permitted to file supplementary or deficiency estimates after the main appropriations have been considered. These belated estimates are also handled, however, by the committee on appropriations.

Proposals  
of ex-  
penditure  
originating  
in the  
House.

New proposals of legislation, many of them involving the expenditure of money, are also introduced by individual congressmen at every session, for congressmen have jealously guarded their own right to propose any form of expenditure, for any purpose, at any time. Such measures go first of all to the specialized committees (e.g. foreign relations, post-offices, or interstate commerce, as the case may be) for consideration on their merits; if they are favorably considered they are then transmitted to the committee on appropriations for its approval of the expenditures involved. A proposal to increase the membership of the interstate commerce commission would first go, for example, to the committee on interstate and foreign commerce. If favored by this committee it would then go to the committee on appropriations before being reported to the House, inasmuch as it contemplates an increased expenditure for salaries. The common practice is to take several proposals of expenditure and weld them together into a single appropriation bill. Sometimes this bill, in order to expedite its consideration by the House, is tacked to some general measure as a "rider." In 1923, for illustration, a bill authorizing numerous expenditures for "the improvement of various rivers and harbors" was hitched to the army appropriation bill. These river and harbor bills, which usually represent the consolidated demands of a host of congressmen (each getting something for his own district) are commonly known as "pork barrel" bills.

Riders.

The final  
stages  
in the  
House.

Upon being reported to the House by the committee on appropriations the bills are put through their various readings. The house has a right to amend as it may please, but from the nature of things this right is not easy to exercise. A body of more than four hundred members cannot, as a prac-

tical matter, give detailed consideration to the long lists of figures contained in the appropriation measures. Unless carefully studied, the bare items do not mean anything. Consequently the bills go through without much change from the committee's recommendations. A little may be taken off here and there, but great changes are not commonly made. And this is a wise policy, for if the House were to devote to appropriations the attention necessary to make all its members familiar with the various items, it would have no time for anything else. The consideration of items in a budget is something which, above all other matters of legislation, lends itself to committee work.

Having passed the House the appropriation bills which make up the budget go to the Senate. Here also they are referred to a committee on appropriations, with the exception of the rivers and harbors bill, which is referred to the committee on commerce. Before these two committees the senators may urge amendments, and many of them do so, usually in the way of proposed increases. Heads of departments and of bureaus who have had their estimates reduced in the House are in the habit of continuing their importunities before the Senate committees, usually with some success. Even members of the House of Representatives who have failed to impress their own colleagues with the merits of their requests for appropriations do not hesitate to appear before the Senate committees and reiterate their arguments. When the bills are reported to the whole Senate, accordingly, the aggregate amounts are often increased. With these amendments and others that may be added in the Senate itself the bills are sent back to the House for concurrence, and if the House does not agree to the Senate's changes they are referred to committees of conference made up of selected senators and representatives. It is the function of these conference committees to adjust the items and get them finally passed. Compromises are made here and there; the conferees report their agreements to their respective chambers, which then pass the bills and send them to the President to be signed.

When an appropriation bill has been passed by Congress the President has virtually no alternative but to accept it. He can veto the whole bill if he chooses to do so; but he cannot veto any items in a bill, leaving the rest to stand. To veto a whole

Appropriation bills in the Senate.

Influence  
of the  
President  
on appro-  
priations.

appropriation bill because certain items in it are objectionable, thereby depriving some department of the national government of funds for carrying on its work, is a rather drastic step. Consequently the President, as a rule, registers his objections to the offensive items but signs the bills all the same. The result is that the veto power, so far as the spending of public money goes, is reduced almost to a nullity. This arrangement is both embarrassing to the President and costly to the taxpayers. Public opinion holds the President responsible for extravagances which he is in reality quite powerless to prevent.

How  
appropria-  
tions are  
made in  
other  
countries.

The foreign student of government who reads the foregoing paragraphs will notice that two things stand out prominently: first, the marked difference between the way appropriations are made in the United States as compared with other countries, and second, the considerable share which the Senate has assumed in the authorizing of expenditures. In England, in France, and indeed in every country having constitutional government except the United States and the Latin-American republics, there is a centralization of responsibility for all proposals to spend public money. In England, no proposal to spend money can be considered by the House of Commons unless it comes from the crown, that is, unless it comes to the House with the indorsement of the cabinet.<sup>1</sup> No proposal of expenditure is acted on by the Chamber of Deputies in France if it is opposed by the executive branch of the government. In the United States, on the other hand, any head of a department, any senator, any representative, any citizen in fact, may obtain a hearing upon proposals to spend the nation's money.

Value of  
the new  
American  
budget  
system.

The passing of the Budget and Accounting Act represented a notable step in the direction of fixing financial responsibility, nevertheless the control of national expenditures is not yet so fully concentrated as it ought to be. The director of the budget has been given the initiative, but not the sole initiative. Congress retains the right to initiate appropriations without any prior action on the part of the executive. The result is that complete responsibility belongs neither to the executive nor to the

<sup>1</sup>Here is the rule (adopted more than two hundred years ago): "This House will receive no petition for any sum relating to the public service, or proceed upon any motion for a grant or charge upon the public revenue—unless recommended by the crown."



legislative branch of the government; it is divided between the two. A President may pledge economy, but unless he have the co-operation of Congress he cannot redeem his pledge. It is one of the defects of the American budget system, as applied to the national government, that it does not go far enough in focussing responsibility for the wasteful expenditure of public money. It affords too much scope for evading the blame. In this respect the British and French methods of controlling national expenditures are more effective than those used in the United States.

How might this defect be remedied? One change would certainly be of advantage, namely, the adoption in both the House and the Senate of a standing rule that no proposal of expenditure shall be in order unless recommended by the President. It may be urged that such a provision would be unworkable because the executive and legislative branches are not always, as in England, harmonious as to public policy. In reply it need only be pointed out that political inharmony between the mayor and the council is often found in American municipal government, yet the provision that no appropriation can be considered by the city council unless it is recommended by the mayor has been inserted with good results in many city charters. Congress could manage its expenditures under the operation of a similar rule if compelled to do so. It would still have the right to strike out or to reduce any item, but not to insert or increase. It may be of interest to note that the framers of the short-lived constitution for the Confederate States of America in 1861 adopted a provision of this nature.

Suggested  
changes  
in rules  
relating  
to appro-  
priations.

The second feature which stands out prominently in the American budget system is the relatively large power of the Senate. The House of Lords in England, and the Senate in France do not reject appropriation bills. The House of Lords cannot insist on amendments and the French Senate does not. It was taken for granted by those who framed the American constitution that the House of Representatives would "hold the purse," as Madison phrased it. But the actual words of the constitution do not so specify and the Senate has seized its opportunity to the full.

Much unhappiness comes to individuals by reason of their carelessness, their lack of a good planning, in money matters.

Thrift  
as a  
national  
virtue.

The nation which tolerates similar incaution, or lack of good planning in its public finance, will eventually get itself into trouble also. Thrift is a national, as well as a personal virtue. We look at the national expenditures and say: "What are three billions a year to a hundred million people?" It is only thirty dollars per capita, less than a dime a day! But let us not forget that forty-eight states are also taking money from the citizen's pockets and spending it; so are all the counties, cities, towns, boroughs and townships. The total cost of governing the American people is not ten cents daily per head but several times as much. A few years ago the state commissioner of taxation in Massachusetts compiled a statement showing the total amount raised from the people of that commonwealth in federal, state and local taxes. It amounted to \$117 per annum for every man, woman and child in Massachusetts—and this state is no more heavily taxed than several others. Now since only one person in three, on the average, is engaged in any gainful occupation, it follows that this one person must earn the per capita taxes of the other two. In other words every Massachusetts citizen engaged in a gainful occupation must contribute on the average \$351 per year, or nearly a dollar a day, in public taxes.

But you will perhaps reply that the average man does not pay anything like that amount,—that it is the rich man who pays the bulk of it. Therein you are wrong. The average man pays his full share of it,—in higher rents, prices, fares, gas bills, and the like. Hear him groaning at the high cost of everything, and railing at the profiteers. He ought to focus his grumbling upon the high cost of government, and direct his raillery against his own senators, congressmen, assemblymen, and city councillors who are responsible for it.

## CHAPTER XVIII

### THE BORROWING POWER, THE NATIONAL DEBT, AND THE BANKING SYSTEM OF THE UNITED STATES

Fundamentally, the principles of public indebtedness do not vary greatly from those of private credit. In each there must be confidence in the borrower's payment of interest and principal when due.—*Davis R. Dewey.*

Not all national expenditures can be defrayed out of income. Extraordinary undertakings which involve great outlays, such as the financing of a war or the construction of an inter-oceanic canal, or the creation of a great fleet of merchant vessels, cannot be carried through from the funds which the taxes provide. All governments, accordingly, must have command of resources which will enable them to meet such emergencies when they arise. The constitution provides for such eventualities by giving to Congress the unlimited right "to borrow money on the credit of the United States."

Purpose  
of the  
borrowing  
power.

This is one of the few powers upon which the constitution places no limits whatsoever. Congress can borrow as much as it pleases and in whatever manner it deems expedient. There was a good reason for dealing liberally with the federal government because the national credit was at its lowest point in 1787. The Congress of the Confederation had encountered the greatest difficulty in borrowing upon any terms. Moreover, it was clear that the new national government would start with a heavy burden of debt on its shoulders. Bonds had been issued during the Revolutionary War both by the Confederation and by the several states. The former would certainly be a charge upon the new administration, and the latter would probably have to be taken over as a part of the national debt. That, indeed, is what soon came to pass.

Absence of  
limita-  
tions  
upon it.

Beginnings  
of the  
national  
debt.

The funding of these various obligations, which amounted in all to over \$125,000,000, was the work of Alexander Hamilton,

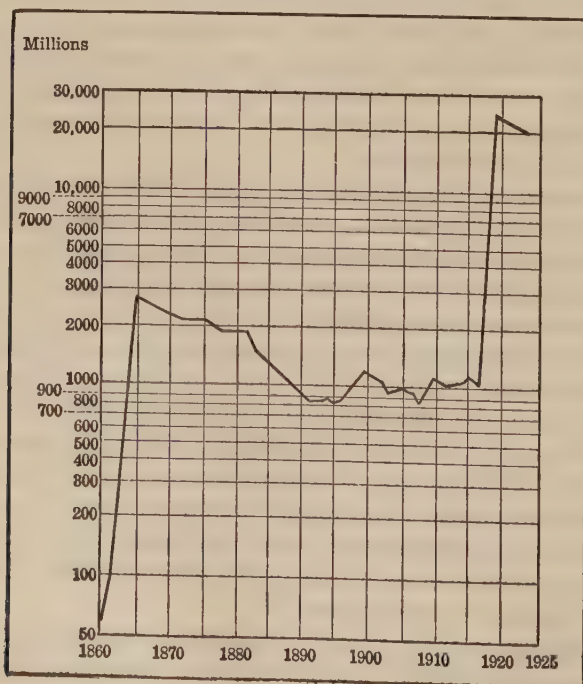
The legacy  
of the Revo-  
lutionary  
War:

Alexander  
Hamilton's  
work in  
funding it.

who served as secretary of the treasury during the years 1789-1795. To Hamilton also was due the beginnings of a system of federal revenues which not only provided for the ordinary expenses of government, but made possible the gradual extinction of the nation's indebtedness. During the War of 1812 some new bonds were issued, but twenty years after the close of this war the entire national debt had again been virtually paid off. Not only that, but there was a surplus in the federal treasury which Congress distributed among the states. For twenty-five years, 1836-1861, the United States was the only great country in the world without a national debt of any appreciable dimensions. Then came the Civil War, and during the years 1861-1865 the debt rose by leaps and bounds to an unprecedented height.<sup>1</sup>

<sup>1</sup> The course of the national debt, from 1860 to 1925, is shown by the appended diagram which has been drawn on a logarithmic or proportional scale in order to make clear the fact that the *ratio of increase* during the world war was by no means so great as that during the civil war.

THE NATIONAL DEBT, 1860-1925





At the close of this war the interest-bearing indebtedness of the nation stood at about three billions of dollars, but this does not tell the whole story, for much borrowing had taken place in a roundabout way through the issue of paper currency. This financial legacy of the Civil War was steadily reduced, however, and during the twenty years which followed Lee's surrender the national debt was brought down to about six hundred millions. Then the pendulum began to swing once more in the other direction. In the second Cleveland administration bonds were issued to replenish the gold reserve in the treasury, and later, during the war with Spain, there were additional borrowings. The building of the Panama Canal, during the ensuing era, added several hundred millions to the total, so that the national debt, on the eve of America's participation in the European War, was about a billion dollars in round figures. Viewed in the light of to-day this single billion of ten years ago seems insignificant. The war borrowings for the two years 1917-1918 alone amounted to twenty-five billions, or almost eight times the highest figure ever reached at any previous time. Of this amount about ten billions were loaned to European associates. Already we have begun to reduce this debt and thus far have made more rapid progress than was made during the years immediately following the close of the Civil War. The national debt of the United States today is about two hundred dollars per capita. This is a small burden when compared with the debts of the chief European countries. But the figures of national debt do not tell the whole story. The states have debts, most of them, and so have the counties, cities and towns. The cumulative burden is far more than two hundred dollars per head.

During the first quarter of the nineteenth century the Supreme Court was called upon to interpret the scope of the powers conferred by the borrowing clause, in other words to settle the question whether Congress might, under cover of its power to borrow money, establish a national bank. The constitution contains no mention of banks or banking. A proposal to give the national government such power in express terms was rejected by the constitutional convention. Accordingly, the power to charter and regulate banks might at first glance be looked upon as falling within the residuum of authority reserved

The Civil War debt.

The national debt since the Civil War.

The "Liberty" issues.

Scope of the borrowing power.

May Congress charter banks?

to the states.<sup>1</sup> But Alexander Hamilton, as secretary of the treasury did not so understand it and proceeded to prepare a plan for the establishment of a great national bank, somewhat after the model of the Bank of England, and in 1791 Congress chartered the first Bank of the United States. The ostensible purpose of this action was to provide a financial institution which would assist the national government in the exercise of its borrowing power, in the collection of its revenues, and in the custody of its funds.<sup>2</sup> Washington was in serious doubt as to whether he should sign the bill which chartered this bank, but Hamilton in a skilfully written argument persuaded him to give his signature despite the strenuous opposition of Thomas Jefferson, who was also a member of the cabinet as secretary of state.<sup>3</sup>

The first Bank of the United States continued in existence until 1811 when its twenty-year charter expired. It established eight branches in different parts of the country, served as a depositary for public funds and loaned the government considerable sums of money. The bank was well managed and proved profitable, but its charter was not renewed in 1811, chiefly because it had aroused the opposition of many small state banks whose jealousy of the national institution was now reflected in Congress.<sup>4</sup>

Five years later, however, the financial embarrassments caused by the War of 1812-1815 determined Congress to establish the second Bank of the United States, and its charter was signed in 1816 by President Madison, whose misgivings on the

<sup>1</sup> James Madison, as is well known, disagreed with Hamilton on this matter. Madison declared that the establishment of a national bank by Congress was "condemned by the silence of the constitution, by the rule of interpretation arising out of the constitution, by its tendency to destroy the main characteristics of the constitution; and by the expositions of the friends of the constitution whilst depending before the people."

<sup>2</sup> In 1781, several years before the adoption of the constitution, the Bank of North America had been chartered by the Congress of the Confederation. This institution, however, encountered popular opposition and soon surrendered its charter from the congress, obtaining instead a charter from the state of Pennsylvania.

<sup>3</sup> This document is reprinted in H. C. Lodge's edition of Hamilton's *Works* (12 vols., N. Y., 1904).

<sup>4</sup> The Bank of the United States had also allowed more than two-thirds of its capital stock to pass into the hands of foreigners, and this fact was urged as an additional reason for not renewing its charter. For the history of this bank see J. T. Holdsworth, *The First Bank of the United States* (Philadelphia, 1910).

The first  
Bank of  
the United  
States,  
1791-1811.

Its history  
and end.

The second  
Bank of  
the United  
States.

question of constitutionality had now become mollified. The capital of this bank was fixed at thirty-five millions; it was empowered to issue paper money; it served as a depository for public funds; it assisted the treasury department in the collection of the public revenues and at times made temporary loans to the national government. Its charter was fixed to run for twenty years.

Thus far the authority of Congress to charter a bank had not come squarely to issue before the Supreme Court, but the second Bank of the United States had just begun its operations when the question of constitutionality was brought forward in a way which enabled the point to be settled for all time.

In 1818 the legislature of Maryland imposed a stamp tax on the bank's paper money, and the cashier of the Baltimore branch, McCulloch, refused to pay this tax. He was convicted by the Maryland Courts and appealed to the Supreme Court of the United States. This tribunal, in 1819, set a landmark in American constitutional development by its opinion in the famous case of *McCulloch v. Maryland*.<sup>1</sup> The decision in this case, written by Chief Justice Marshall, has become a classic of American jurisprudence. In words which for clearness and force cannot be improved upon, Marshall laid down the principle that though the national government "is limited as to its objects," it is none the less "supreme with respect to those objects," and hence that where an express object is authorized by the constitution, "any means adapted to the end, any means that tend directly to the execution of the constitutional powers of government, are in themselves constitutional." In express terms the constitution had given the national government the power "to lay and collect taxes" and "to borrow money on the credit of the United States." It had also expressly granted to Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Putting these provisions together, the Supreme Court held that Congress must be allowed discretion in choosing the sort of laws "necessary and proper" for carrying out its undoubted right to collect revenue or to borrow.

Congress being thus authorized to provide its own financial mechanism, it followed that any agency or institution created

The question of its constitutional status.

The decision in *McCulloch v. Maryland*.

Chief Justice Marshall on the implied power to charter banks.

<sup>1</sup> 4 Wheaton, 316.

No state  
may tax  
the cir-  
culation or  
deposits  
of banks  
chartered  
by  
Congress.

for this purpose must not be subjected to the danger of destruction by the states. "If," declared the court, "the states may tax one instrument employed by the [national] government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the custom-house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." And since the power to tax involves the power to destroy, Marshall argued, this power of the states, if permitted, would make possible the destruction of the national government. For this reason the law of Maryland which taxed the circulation of the United States Bank was declared unconstitutional.

Importance  
of the  
decision.

The decision in this case was of the highest national importance, for it set the powers of the federal government upon a firm and sure foundation. It gave them a new vitality. Its reasoning is a tribute to Marshall's intellectual power, to his political sagacity, to his judicial statesmanship, and to his mastery of the English tongue.<sup>1</sup> If his fame as a jurist rested on this one decision alone, it would still be secure. For this decision made the power of Congress a living thing, capable of growth, capable of keeping pace with the needs of the nation. The extreme champions of strict construction, the protagonists of states' rights, denounced it in the most violent terms. "A deadly blow," they sputtered, "has been struck at the sovereignty of the states," by judges who are "so far removed from the people as to be hardly accessible to public opinion." The court was assailed in 1819 for its decision in *McCulloch v. Maryland* in exactly the same hasty anger that it is being assailed by the radicals of to-day. But to-day nobody believes that the decision of 1819 was unwise. On the contrary it is everywhere conceded to have been a nation-making stroke, a triumph of union over sectionalism, and to have saved Congress from

<sup>1</sup> "Marshall was probably the greatest judge that ever lived, when one considers the wonderful cogency and beauty of his judicial style, his statesman's foresight, the accuracy of his legal learning, the power of his reasoning, his soundness of judgment, his wonderful personal influence over his colleagues, and the fateful influence of his work upon the structure of our great government."—W. H. TAFT, *Our Chief Magistrate and His Powers* (N. Y., 1916), p. 46.



what would surely have been the first of a series of inroads upon its constitutional power.

The second United States Bank came to an end in 1837, but not because of any doubts as to its constitutional status, nor yet because it lacked prosperity. It was drawn into the arena of politics where Andrew Jackson and his matadors waged a winning fight with it. It was said that the managers of the bank's branches in different parts of the country were showing political favoritism in making loans, that the bank itself was endeavoring to crush local banking institutions, and was aiming to become a great financial octopus. This line of attack proved effective in a day of strong anti-capitalistic feeling. Jackson vetoed a bill passed by Congress for renewing the bank's charter and withdrew all government deposits from it. Forced to the wall, the institution was converted into a state bank, but in this field it proved unsuccessful and finally went out of existence altogether.<sup>1</sup>

Jackson's  
war on  
the Bank.

Its exodus.

Although movements for the establishment of a new national bank with a federal charter were set afoot from time to time during the next twenty-six years, none of them succeeded. The banking operations of the country were carried on during this period by institutions chartered in the several states. These banks flooded the country with paper money, with an insufficient reserve behind it, and when the war came, they ceased redeeming these notes in coin. They could give the national government little or no help in floating its war loans. So in 1863, when the secretary of the treasury was hard pressed in his effort to sell bonds on reasonable terms, Congress was induced to pass the first of the laws which laid the foundations of the national banking system as it exists to-day.

Banks and  
banking  
from the  
Jacksonian  
era to the  
Civil War.

Briefly, the National Banking Act of 1863, as considerably amended by other statutes passed in the two following years, imposed a heavy tax upon the paper money of all state banks, with intent to drive these notes out of existence. It then provided that any bank incorporated under the new law might issue untaxed circulating notes, provided it bought United States bonds to a designated amount and deposited these bonds in Washington as security for its note issues. Fundamentally,

The  
National  
Banking  
Act of  
1863-1865.

<sup>1</sup>The full history of its vicissitudes may be found in R. C. H. Catterall's *Second Bank of the United States* (Chicago, 1903).

then, this legislation was merely a scheme to create an artificial market for government bonds at a time of great national need, although a secondary purpose was to substitute uniform bank notes (with a federal guarantee) for the multifarious and voluminous issues of state banks. In this way the inflation of the currency, and hence the rise in the general level of prices, could be controlled. The legislation worked out surprisingly well, and after the war its main provisions were retained. By various amendments to the national banking laws the system was improved from time to time, and it is still in operation although the importance of the national banks, as fiscal agents of the government, has been greatly reduced since the establishment of the federal reserve bank system. A national bank, at any rate, is a bank which holds its charter from the national government and is subject to its supervision. A state bank, or trust company, holds its charter from the state and is subject to state supervision.

Defects  
of the  
national  
banking  
system :

1. Inelas-  
ticity of  
reserves.

For many years prior to 1913 it was generally recognized by financial authorities that the national banking system of the United States was in some respects very faulty. The provisions relating to the reserves were too rigid and became particularly embarrassing to the banks in times of commercial depression. Every national bank was (and still is) required to keep a "reserve" amounting to a certain percentage of its total deposits. It was not necessary to keep this reserve in the bank's own vaults; a part of it might be placed upon deposit in larger banks where it would draw interest. As matters turned out, a considerable portion of the reserves was usually deposited with large banks in New York City. In times when business was good and money plentiful this arrangement worked very well, but when periods of business depression arrived and money became scarce every small bank naturally drew upon its reserve deposits in the larger banks, which found difficulty in paying them all at the same time.

2. Inelas-  
ticity of  
note issues.

Another defect arose from the inflexibility of note issues. Each national bank could issue paper money, but only up to the total amount of bonds deposited by it in Washington. Now whenever business was good the demand for paper money (to carry on the operations of business) would naturally increase but there would be no corresponding increase in the amount of

national bank notes available. For these notes were related to government bonds and not to the volume of business done in the country. What was needed, therefore, was some arrangement whereby bank notes and bank credit would automatically expand in times of business prosperity and then deflate as the volume of business decreased.

To provide this elasticity was the purpose of the Federal Reserve Bank Act which Congress passed in 1913. By the provisions of this statute the United States is divided into twelve federal reserve districts, with a federal reserve bank in each. The capital stock of each federal reserve bank is held by banks within the district (member-banks, they are called) or, in a few cases, some of the stock is held by the government. Each reserve bank is controlled by a board of directors chosen in part by the banks who own stock and in part by the national government through a body known as the federal reserve board. This board is composed of the secretary of the treasury, the comptroller of the currency, and six other members appointed by the President.<sup>1</sup> These twelve federal reserve banks are now the reserve depositories for such smaller banks as have subscribed to their capital stock, and they also lend funds to the smaller banks upon approved security when funds are needed. The federal reserve board has authority to change the percentage of reserves required, and each of the twelve federal reserve banks has the right to issue paper money. In time these notes will replace the notes which have been issued by the national banks. The new system thus secures flexibility in the amount of reserves required; it discourages the piling-up of funds in any one large financial centre; it enables small banks to get their reserves quickly when needed and also to borrow or rediscount easily; and, finally, it provides in the federal reserve board a central authority which is able to furnish the entire banking interests of the nation with guidance and leadership in an emergency. It gives the United States, in a word, all the advantages which other great countries derive from their centralized banking systems, yet it does not create a single gigantic institution like the Bank of England, or the Bank of France, or the German Reichsbank.

The  
Federal  
Reserve  
Bank  
System  
established  
(1913).

<sup>1</sup> At least one of these members must be a representative of agriculture, a "dirt-farmer," as the colloquialism goes.

Bankers' banks.

The federal reserve banks are "banker's banks"; they do no business directly with individual customers. Their chief function is to act as depositaries for the government and for member banks, and to serve as "rediscounting" institutions. This last statement needs a word of explanation.

The process of discounting.

When any national bank or state bank lends money, and takes a man's note, with or without collateral, it is said to "discount" the note. It gives the borrower the face value of his note less the interest, whatever it is, calculated at the current rate. Thus if the rate is six per cent and the person gives his note for one thousand dollars payable in six months, the bank would hand him \$970 in money. Business men obtain large sums of money from the banks by getting their notes discounted; they borrow money in this way to buy goods and then pay off their notes when the goods are sold. Such notes are called "commercial paper."

Rediscounting.

Now suppose a bank has loaned all the money it has to spare. When it receives applications from its customers for more loans, what does it do? It takes a bundle of business men's notes, or commercial paper, from its vaults and sends them to the nearest federal reserve bank. The latter does just what the member bank did in the first instance; it deducts the discount and gives the balance to the member bank in money. The member banks are enabled, in this way, to loan a great deal more money than would be the case if there were no way of getting their commercial paper rediscounted.

Note issuing by federal reserve banks.

But how do the federal reserve banks obtain the money to do this? They are allowed to issue new paper money called *federal reserve notes* to an unlimited extent on the security of rediscounted commercial paper and other "collateral," provided they also keep a gold reserve amounting to forty per cent of the total notes issued. This gold they obtain by serving as depositaries for the surplus funds of the government and the reserves of member banks. In addition they are empowered to issue *federal reserve bank notes* secured by United States bonds in the same way as national bank notes are secured.

Value of the federal reserve system.

Since their establishment in 1913 the work of these federal reserve banks has been of great value. They have enabled the banking operations of the country to expand and contract in accordance with changes in business conditions, thus obviating



serious danger of financial panics. When business increases, the rediscounts grow; but the federal reserve banks can put a check upon the too-rapid expansion of business by raising the rediscount rates. In helping the government to float the various Liberty Loans the new banks rendered great service to the nation. There is no doubt that the system has improved and strengthened the banking facilities of the country.

The national banking system and the federal reserve banks were developed, in the main, to meet the requirements of industry and commerce. They did not cater to the special needs of agriculture and stock-raising. Yet these needs were steadily becoming greater, for as agriculture becomes specialized its operations require more capital. The grain farmer of the West, the cotton planter, the rancher, the fruit grower, the dairy farmer—all require credit facilities beyond those which were needed by the diversified farming system of earlier days. To furnish the farmer with facilities as good as those which had been provided for the merchant and manufacturer, Congress in 1916 passed an act establishing a system of federal farm loan banks. This system is somewhat complicated, and cannot easily be explained in a few paragraphs; but its essential features may be summarized as follows: A federal farm loan board is established in Washington, its membership consisting of the secretary of the treasury (who serves as chairman) and four others appointed by the President. This board has general charge of the system. The entire country is divided into twelve districts, each of which contains a federal farm loan bank. At the outset the capital for these banks was provided by the national government, but the stock is gradually being taken over by "farm loan associations" as will be explained in a moment. Each district bank is managed by directors, all of whom were originally appointed by the farm loan board at Washington, but a majority of whom will be appointed by the farm loan associations whenever these organizations have replaced the government as stockholders in the banks.

The  
farm  
loan  
bank  
system.

How  
organized  
and  
controlled.

The farm loan banks do not ordinarily lend money direct to individual farmers or ranchmen but to organizations.<sup>1</sup> Any ten farmers desiring to borrow money can form such an associa-

How they  
function.

<sup>1</sup> There is a provision that where no farm loan association has been organized the bank may lend money to individual farmers through approved agents.

tion; but each farmer must take stock in his association to the equivalent of 5 per cent of the total amount which its members desire to borrow. Every borrower, therefore, is a stockholder in the farm loan association, and every association is a stockholder in its district bank. Thousands of these associations have been organized; they exist to-day in practically every agricultural country throughout the United States.

An illustration.

Let us suppose, now, that a farmer desires to borrow \$5000 by giving a mortgage on his land. Ten years ago he would have gone to an ordinary bank or loan company and paid a high rate of interest. To-day he can form a loan association by subscribing \$250 to its capital stock.<sup>1</sup> Then he fills out an application blank which the secretary-treasurer of the loan association transmits to the nearest farm loan bank. This bank sends out a valuator or appraiser to make sure that the land is good security for the loan; he also enquires into the borrower's reputation for honesty. If he reports favorably the loan is granted; the farmer gives the bank a mortgage on his land; and the money is sent to him through the secretary-treasurer to the farmer. No single farmer may borrow more than \$10,000, nor more than 50 per cent of the appraised value of his land. He can borrow only for some purpose directly connected with agriculture and not for speculation. He must repay the loan in designated installments each year. And in no case is he charged more than six per cent interest.

Where the farm loan banks get their funds.

Where do the farm banks get the money with which to make these loans? They do not issue notes, like federal reserve banks. They are authorized to sell bonds based upon the mortgages which they hold. These bonds (known as federal farm loan bonds) are bought by private investors. They are fully tax-exempt and for this reason are regarded as a desirable private investment. This process of borrowing by the sale of bonds and lending to farmers on mortgages is carried on by the farm loan banks to any amount so long as the total bonds do not exceed twenty times the amount of the bank's paid-up capital stock. To put the thing in a nutshell; the banks borrow money from private investors and then lend it to the farmers at a slight advance in interest. The lending is done through loan associations

<sup>1</sup> Notice that he *subscribes* it; he does not have to *pay* the five per cent until after he gets his loan.

in a way which makes each association the guarantor of all loans secured by its members. During the past nine years the twelve federal farm loan banks have made loans aggregating a billion dollars.

But this is not all that the national government has done in the way of providing special credit facilities for the agriculturist. Prior to 1916 there were many private banks and mortgage companies engaged in the business of lending money to farmers. These institutions feared that their business would be completely wiped out by the competition of the new federal farm loan banks, hence they insisted that some protection be afforded to them. It was accordingly provided that these institutions might become joint stock land banks by complying with certain conditions. The federal farm loan board is empowered to issue charters to these banks and to supervise their operations but it should be made clear that the banks are private institutions. Their capital is not provided by the government; it is supplied by individual stockholders. They also obtain money by selling bonds to private investors but these bonds, like the bonds of the federal farm loan banks, are exempt from all taxation. This feature of the system has been very much criticised and deservedly so, for the joint stock land banks are not government banks in any sense and should not be given a privilege which is denied to other private banks.<sup>1</sup>

Finally, there is a system of intermediate credit banks. These banks are located in the same twelve cities as the farm loan banks and are under the supervision of the same officers and directors. They are authorized by an act which Congress passed in 1923. Their capital has been in each case supplied by the United States government. These intermediate banks are authorized to rediscount paper for national banks, state banks (or trust companies), savings banks, agricultural credit corporations, co-operative associations, and similar organizations, provided the original loans were discounted for agricultural purposes. They may also loan to agricultural coöperative associations and other

Other  
banking  
facilities  
for the  
farmer:

1. Joint  
stock  
land  
banks.

2. Inter-  
mediate  
credit  
banks.

<sup>1</sup>The joint stock land banks do not lend money through the intermediary of loan associations; they deal directly with the individual borrower. They may lend as much as \$50,000 to a single individual and they are not restricted to a maximum six per cent rate of interest. About thirty of these banks have now been established in various parts of the country and are doing a large business.

such organizations on the security of warehouse receipts, or on live-stock mortgages.<sup>1</sup>

A highly complex system of credit and banking.

The banking system of the United States is more complicated than any other in the world. Very few students of American government try to understand it; they think that banking and credit are matters of economics, not of political science. In a sense that is true, but the control of currency and credit (and through them the control of prices) is one of the most important functions which the government performs. In the United States it is performed by both the national and state governments. The national government is responsible for the supervision of the federal reserve banks, national banks, farm loan banks, joint stock land banks, and intermediate credit banks. The state governments are responsible for the supervision of state banks, trust companies, savings banks, coöperative banks, and all other banking institutions. Most countries have only one, or at most two, types of banking institutions; in the United States we have at least nine or ten.

The mechanism of borrowing.

But to return from banks to borrowing. How does the national government "borrow money on the credit of the United States"? The most common plan has been to borrow by the issue of bonds. These bonds are promises to pay on the expiration of a designated period, say twenty, thirty, or forty years, with interest at a stated rate during the lifetime of the bond. For the most part the national government has borrowed from banks or groups of banks, giving them the bonds which they either resell to private investors or deposit at Washington as security for their own circulating notes. But the bonds have sometimes been offered for public sale, and subscriptions have been taken not only by banks but by post-offices and other government establishments. To facilitate a direct and general sale to the public, some of the bonds sold during the Spanish War were issued in denominations as low as twenty dollars, and the Liberty bonds issued during the European war were put on sale in denominations as low as fifty dollars. Even so, however, a very large proportion of these bonds were sold to the

<sup>1</sup> For a full discussion of these various matters see Ivan Wright, *Bank Credit and Agriculture* (N. Y., 1922), J. B. Morman, *Farm Credits in the United States* (N. Y., 1924), also the pamphlet on *Agricultural Credit* issued by the finance department of the Chamber of Commerce of the United States (Washington, 1923).



public through the banks. The Liberty and Victory bond campaigns of the years 1917-1919 represented the largest series of borrowings ever put through by any country in so short a period.

From time to time the United States has also borrowed money by the issue of treasury notes. These are promissory certificates or government notes issued in denominations of from five to one thousand dollars and maturing within a short time, usually from one to three years, or even on demand. In some cases they have been issued bearing interest, in other cases without interest. During the Civil War these treasury notes, of all varieties, were issued to a total of nearly two billion dollars. At the close of the war most of them were converted into bonds. Those which remain in existence bear no interest and have become part of the national currency. During the last ten years large issues of interest-bearing treasury notes have also been put on the market from time to time, also savings certificates, thrift stamps, and other minor forms of government securities.

Treasury  
notes.

Certain issues of currency, for example the silver dollar, the silver certificate, and the fractional coins, have sometimes been referred to as examples of a method of borrowing money, inasmuch as they yield more to the national government than it costs to issue them. Ordinarily the silver dollar does not cost a dollar to coin, nor does the nickel represent five cents' worth of that metal. The difference between what they cost and what the government gets for them, however, is a profit rather than a loan. They do not, at any rate, form part of the interest-bearing debt and do not increase the burden placed upon the taxpayer.

Borrowing  
by the  
issue of  
currency.

In no case has there ever been a repudiation of the national debt of the United States or any part of it. Repudiation of the debts owed by some of the individual states, however, has occurred on several occasions.<sup>1</sup> Where such action takes place, the holder of a repudiated bond has no effective legal redress. He cannot sue the state except in its own courts, and even there he has no status as a plaintiff unless the state gives it to him, which it is not likely to do. He cannot enter suit in the fed-

Repudia-  
tion of  
public  
debts.

<sup>1</sup> Eleven states, mostly in the South, have repudiated some of their state issues at various times. W. A. Scott, *The Repudiation of State Debts* (N. Y., 1893).

eral courts, because the eleventh amendment prohibits the federal courts from hearing any citizen's suit against a state.

After the Civil War there was a fear in financial circles that some portions of the national debt might be repudiated. To allay these misgivings the fourteenth amendment provided in 1868 that "the validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned." It was furthermore stipulated that neither the United States nor any state of the Union should assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave. Debts incurred by the Confederacy or by any state of the Confederacy in connection with the Civil War were thus nullified by constitutional provision.

The fourteenth amendment as a security against repudiation.

The practice of refunding.

The burden of a national debt may at times be lessened by the process known as refunding. The government, when bonds are issued, may reserve the right to pay them off at any time after a designated date. If at that date the general rate of interest has fallen, it may secure the money to make the repayment by the issue of new bonds at such lower rates. Or at the expiry of the term designated in the bonds it may offer the holders their choice either of cash payment or of new bonds bearing a lower rate of interest. If the government, for example, borrows a billion dollars at five per cent in war-time on bonds which are to run for twenty years, this does not mean that it must either repay the loan at the expiry of that period or keep on paying interest at five per cent. It can, and probably will, "refund" the loan at its expiration by the issue of new bonds bearing only four or perhaps even three per cent interest. This is entirely fair to the original bondholders, who get their option of either taking cash payment as promised or new bonds at current rates. It is thus possible to lessen the real burden of a national debt without actually paying it off.

Sinking funds.

Most of the states and municipalities, when they issue bonds, establish "sinking-funds" to provide for the payment of the bonds at maturity. Then they pay into these funds a certain amount from their revenues each year. The sinking funds are invested and held by trustees. The national government does

not pursue this method. But each year it uses a part of its surplus (when it has a surplus) to buy up some of its outstanding bonds from private holders, and reduces the debt in this way.

Until within the last generation or two all public debts were popularly looked upon as public evils. To get the nation out of debt altogether was deemed to be an end worth making sacrifices for, and the national surplus was used to lessen the load even when public improvements were greatly needed. To-day, however, the old notion has passed away. The whole national bank circulation of the United States and all of the federal reserve bank notes rest upon the public indebtedness.

Economists agree that the creation of debt for certain purposes and within reasonable limits is entirely justified. The doctrine propounded by the first secretary of the treasury, Alexander Hamilton, that a public debt, if not excessive, is a source of national strength and stability would hardly receive general acceptance to-day; yet the opposite contention that all public debts are public afflictions is still further from popularity among students of public finance. Enterprises which result in permanent or semi-permanent value to the people, such as the building of the Panama Canal, or the purchase of forest reserves, or the extension of national territory, ought not, in all fairness, to be paid for entirely by the taxpayers of a single year; that is, they ought not to be wholly paid for out of current revenues. Borrowing money in such a way that the cost will be gradually liquidated in the course of a term of years is the fairer plan, provided, of course, that this policy is not so distorted as to pile up huge debts for future generations to bear. A nation may be both prosperous and thrifty while yet having a national debt of large dimensions.

Is a public  
debt a  
public  
evil?

## CHAPTER XIX

### THE REGULATION OF COMMERCE

The prosperity of commerce is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares.—*Alexander Hamilton.*

It was in recognition of the truth which is set at the head of this chapter that the framers of the national constitution gave to the federal government what have proved to be powers of paramount importance in the matter of encouraging, maintaining, and regulating the commerce of the several states both with foreign countries and among themselves.<sup>1</sup> If there was any one thing upon which the delegates in the constitutional convention of 1787 agreed, it was this: that the orderly expansion of trade, both domestic and foreign, was a prime requisite of national growth and prosperity; that it must be made possible in America; and that it could only be made possible by the establishment of uniform regulations.

The chaotic condition of American commerce during the years preceding 1787 did more than anything else to bring the states together. After the close of the Revolutionary War some discriminatory rules against American commerce were made by Great Britain, and the Congress of the Confederation had no way of making reprisal. Then the various states themselves began adopting commercial tariffs against each other. Connecticut, for example, threw her ports wide open to British ship-

<sup>1</sup> The clauses in the national constitution directly relating to the regulation of commerce are as follows:

The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. (Article i, section 8.)

No tax or duty shall be laid on articles exported from any state. (Article i, section 9.)

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state be obliged to enter, clear, or pay duties in another. (Article i, section 9.)

Commer-  
cial chaos  
before the  
formation  
of the  
Union.



ping while all goods imported into Connecticut from Massachusetts were subjected to duties. Such commercial discriminations, as the world has too often found out, lead directly to retaliation and to war. The mischief was great and the dangers greater. Never could the thirteen states hope to live in peace among themselves if each insisted on the right to further its own commercial advantage at the expense of its neighbors. The regulation of commerce must be made uniform, and uniformity could only be had by giving the regulatory power to some central body.

The constitution, therefore, gives to Congress complete power to regulate commerce with foreign nations and among the several states, but subject to the limitation that such regulation shall not give to one state any preference over another, and that no export duties may be levied. These provisions are deceptively simple on their face; in reality they have become, in their application to present-day commerce and commercial methods, more difficult to define with exactness than almost any other powers granted in the constitution. They were framed in days when life was simpler, when the agencies of commerce were pack-wagons and sailing vessels, when there were no steamships, railroads, telegraphs, or telephones, and almost no manufacturing for sale outside the immediate locality. The task of fitting these phrases of the eighteenth century to the intricate commercial and industrial conditions of the twentieth has devolved upon the Supreme Court. It has been performed, however, with such consistency and success as to provide us with a striking illustration of constitutional expansion. The commerce power has been extended "from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, according as new agencies are successively brought into use to meet the demands of increasing population and wealth."

No one in the constitutional convention could have had even a remote idea of the vast potentialities which lay concealed in these three words "to regulate commerce" nor did the full import of the authority begin to be realized until at least a generation after the Union was established. The decision in the famous case of *Gibbons v. Ogden* (1824) first brought home to the

What the constitution gives to Congress in the way of powers over commerce.

The expansion of these powers.

The first landmark in this expansion: *Gibbons v. Ogden* (1824).

states the extent of the jurisdiction which they had handed over to Congress, and from that time forward the commerce clause has been steadily widened by the inclusion of one thing after another. The elasticity of the written word finds more ample illustration here than in any other field of American constitutional development. Words and phrases, when used in a constitution, have organic properties. Their meanings keep step with social and economic changes; they expand to cover the necessities of each new age; they signify one thing in this generation and another in the next. Those who deplore the cold rigidity of written constitutions and laws are prone to forget that words change their scope and meaning from age to age.

Exact  
definition  
of the com-  
merce  
power is  
impossible.

In any attempt to explain what the phrase "to regulate commerce" means we are confronted with an initial difficulty. The phrase has never been defined, and never can be. The Supreme Court has never ventured to tell us just where the commerce power begins and ends. And it is no wonder, for a definition of the commerce power to-day would be out of date to-morrow. You cannot give an exact definition of anything that changes its form and scope so frequently as this commerce power does. But in a general way it can be described, and in any survey of American government it ought to be, for its importance among the powers of Congress is very great.

What  
commerce  
is.

What, then, is the commerce which Congress may regulate? We have the dictum of Chief Justice Marshall that "commerce is intercourse," but that does not carry us far when it is further explained that not all intercourse is commerce. In another case the Supreme Court declared that commerce embraces "navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph,"<sup>1</sup>—but even this is not all-inclusive, for the court has held in various decisions that commerce includes the transmission of messages by telephone and by radio (as well as by telegraph), the transmission of electric power by high-tension lines and the transportation of oil through pipe lines. All these things are commerce, and so far as they cross the boundaries of a state are within the power of Congress to regulate.

And what  
it is not.

But there are other things, not very dissimilar, which the Supreme Court has excluded from the term commerce. Traffic

<sup>1</sup> *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1.

in bills of exchange, and the selling of insurance policies, for example, have been held to be outside the scope of the term. A few years ago the Supreme Court held that a law passed by Congress for the protection of migratory birds was unconstitutional because bird-migrations are not incidents or instrumentalities of commerce. And, of course, the term commerce does not include the operations of agriculture, mining, forestry, or manufacturing. The Supreme Court has made it clear that the power to regulate interstate commerce gives Congress no authority to determine the conditions of employment in factories.<sup>1</sup>

When we say, however, that manufacturing has been held to be outside the term "commerce," this does not mean that the process and incidents of manufacture can in no way be affected by action of the federal government. Most large industries of today must go afield for their raw materials and for the distribution of their products. They buy raw materials in one state, make them up in another, and sell the finished products in several more. Their import of materials and their export of products fall within the scope of commerce. Even the processes of manufacture must depend to some extent upon the regulations under which this interstate buying and selling goes on. But the extent to which Congress may make such regulations is not well defined. During the years immediately preceding 1918 it was assumed in many quarters, for example, that Congress might prohibit interstate trade in goods made by child labor. But the Supreme Court decided in 1918 that the act of Congress which prohibited such trade was unconstitutional, being an interference in matters which belonged to the states alone. It is settled that Congress cannot, under color of regulating interstate commerce, dictate the conditions under which manufacturing shall be carried on.<sup>2</sup>

Having failed in the effort to put an end to child labor by the exercise of its commerce power, Congress tried another method. In 1919 it imposed a special excise tax of ten per cent on the net profits of any establishment employing children under fourteen years of age. This, of course, was merely an attempt

The relation of manufacturing to federal control.

Congress cannot by the exercise of its commerce power, control the incidents of manufacture.

The child labor decision (1918).

The further decision of 1922.

<sup>1</sup>To avoid a multiplicity of references to the decisions it may be stated that the cases covering these various points may be found in Lawrence B. Evans, *Cases on American Constitutional Law* (Chicago, 1916).

<sup>2</sup>*Hammer v. Dagenhart*, 247 U. S. 251 (1918).

Was the  
court  
consistent?

to regulate the conditions of employment by means of the *taxing* power. It was not revenue that Congress wanted, but the extirpation of an industrial abuse. The Supreme Court, in 1922, declared this law to be likewise unconstitutional. It did so because a majority of the justices felt that if Congress were permitted to regulate the conditions of industry by means of its taxing power there would be no end to the scope of its authority in this field. There would be no ultimate control of industry left with the states. This decision, which was rendered by a five-to-four vote of the justices, drew a good deal of criticism upon the Supreme Court. It seemed to many people that the great tribunal was standing in the way of humanitarian progress. Some years before it had upheld an act of Congress which placed a special tax on the manufacture of oleomargarine when colored to resemble butter. The main purpose of this law was not to get revenue but to protect the farmers against competition. The tax was so heavy as virtually to prohibit the further manufacture of the product in question. But the court declared in this case that it could not "restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." Therefore, it went on to say, we find no merit in the argument that the purpose of Congress in levying this tax was to suppress the manufacture of oleo and not raise revenue.<sup>1</sup>

Many people, even good lawyers, could not see any vital distinction between the power to prohibit the manufacture of colored oleomargarine by taxing it, and the power to prohibit child labor by taxing the net profits of those employing it. But the court made a distinction; it upheld the one and did not uphold the other. The whole matter is one upon which there may be an honest difference of opinion. The constitution clearly intends that the various state legislatures, not Congress, shall determine how manufacturing shall be carried on in each state. Do we wish to transfer this power to Congress? If so, is it not better to amend the constitution than to have the transfer made, under color of the taxing power, by the Supreme Court? Such an amendment is now before the states for ratification.

The  
kinds of  
commerce.

When does commerce become "commerce with foreign nations or among the several states"? The division of power

<sup>1</sup> The Oleomargarine Case (*McCray v. U. S.*, 195 U. S. 27, 1904).



between the federal and states governments on this point is now well settled, although it is not a logical division. All commerce which begins and ends wholly within the bounds of a single state is exempt from control by Congress. The state alone can deal with it. But if at any point between its beginning and its end the commerce passes outside the boundaries of the state, no matter for how short a distance, the whole transaction goes out of the state's jurisdiction and under the control of Congress. Goods shipped from Boston to New York are under federal regulation from one place to the other, not merely while crossing the intervening states. In other words, the only way to keep goods from coming under the power of Congress is to keep them at home, in the state where they are produced. Under present-day conditions of industry that is almost impossible. Every large concern ships some goods by mail, express, motor truck, or freight train into other states, and thus becomes engaged in interstate commerce. For that reason Congress is becoming, more and more, the great regulating authority over commerce of every sort.

Having pointed out the extent of the commerce power possessed by Congress, it remains to indicate more specifically the limitations placed by the constitution upon the exercise of this authority. As already stated, when Congress undertakes to regulate foreign commerce, it must do so uniformly. It cannot discriminate in favor of one section of the country, or in favor of one part of the population as against any other. If it imposes duties upon imports coming into the United States from foreign lands, those duties must be levied at the same rate in all ports to which the goods may come. The same rules must determine the method of valuing the goods, collecting the duties, giving refunds, and so on. Congress must regulate with an even hand. There must be no sectional partiality or discrimination. So long as it observes the rule of uniformity, however, Congress may levy duties either as a means of regulating commerce or of securing revenue, without any limitation as to their nature or amount.

The power to regulate commerce with foreign nations has been exercised, in the main, by the enactment of tariff laws. Strictly speaking, a tariff imposed *for revenue* is an exercise of the taxing power, while a tariff framed *for protection* comes more properly within the scope of the commerce power. But this distinction is

Limitations on the power of Congress to regulate foreign commerce.

The tariff as an instrument of commercial regulation.

of no practical importance, because every American tariff since 1789 has had both purposes in mind. It is merely that the emphasis has sometimes been on revenue, and sometimes on protection.

Beginnings  
of  
American  
tariff  
history.

A few paragraphs on the tariff policy of Congress may not inappropriately be added here, for tariff questions have bulked large in the history of American politics, more so, perhaps, than any other single issue or group of issues.<sup>1</sup> To begin with, the prevailing opinion in the thirteen states at the close of the Revolutionary War leaned rather strongly to the doctrine of free trade. That was natural, because the taxing of trade by parliament had been one of the causes of the war. But when the constitution had been adopted and a new national government established, one of the first acts of Congress was to enact a tariff in which the desirability of protecting the industries of the country was frankly asserted. The duties imposed by this first tariff of 1789 were relatively low, but they mark the beginning of the protectionist movement.

Hamilton's  
*Report on  
manu-  
factures*  
(1791).

This movement soon gained force, moreover, by reason of the cogent arguments put forth in its behalf by Alexander Hamilton in his famous *Report on Manufactures* (1791), a document which still ranks as a classic of protectionist literature. Nevertheless, the duties on imports continued to be fixed at low figures, and there was little in the way of tariff controversy until the war with England began in 1812. Duties were then doubled, and when the war was over, they were not materially reduced. During the next two decades, indeed, they kept going up; the principle of tariff-for-revenue being relegated to the background, while protectionist sentiment gained headway. The northern states favored protection, and they were for the time in control of Congress. By 1832 the tariff had become a powerful weapon of industrial protection. Then came a reaction, slow at first and temporarily interrupted on one occasion, but gaining in impetus as the years went by. The tariff was revised downward from time to time until it came almost to a revenue basis once more.

The tariffs  
of the  
period pre-  
ceding the  
Civil War.

The Civil  
War tariffs.

The Civil War inaugurated a third period in tariff history. So much money was needed to finance the struggle that duties again shot up to high levels. And when the war ended, the need

<sup>1</sup>For a full narrative see F. W. Taussig, *Tariff History of the United States* (7th ed., N. Y., 1918).

of revenue to liquidate the debt was urged as a reason for keeping the duties where they were. The Republicans were in the saddle, and they were committed to the policy of protection. So firmly was the gospel of protection anchored in the public mind that General Hancock, the Democratic candidate for the presidency in 1880, suggested that the tariff was merely a "local issue."<sup>1</sup> But it was in truth a national issue and with various short intermissions it has not ceased to be such. On a dozen or more occasions since 1880 Congress has revamped the tariff, revising it up or revising it down, narrowing or widening the free list; but it has never departed altogether from the principle of protection. Congress continues to regulate foreign commerce by taxing it for the benefit of American industry. The constitutionality of its power to do so is not doubtful in the slightest degree. The right to regulate commerce includes the right to tax imports or even to prohibit imports altogether.

Tariff developments since 1880.

In the enactment of tariff legislation, however, the national legislature has not always shown itself at its best. The machinery of Congress is not well adapted to secure the best results in tariff-making. Since 1861 all tariff measures have been framed by the ways and means committee of the House of Representatives, or, more accurately by the majority members of this committee. Lobbyists by the score, representing every form of industry, flock to Washington and put pressure on the committeemen. After the committee has prepared the bill and its accompanying schedules, the measure is taken up by the entire House. Here it may be amended at will in the interest of any proposition that can secure a majority. Then the bill goes to the Senate, where the process of overhauling is continued, and where entirely new schedules of duties may be attached to it.

The procedure of Congress is not well adapted to tariff-making.

Then it is sent back to the House again. To reconcile whatever differences may exist between the action of the two chambers a committee of conference is appointed, and this committee makes the final readjustments. In the end the tariff is altogether likely to be a mosaic of compromises, bearing little resemblance to the original measure, with no one directly respon-

<sup>1</sup> Hancock's words were "the tariff is a local affair," but his dictum has passed into popular currency as "a local issue." What he meant was that the country as a whole favored protection but that every local area wanted a different sort of tariff.



sible for its final form and nobody satisfied. On rare occasions, however, this has not been the case. When one political party controls a working majority in both House and Senate, when the leaders are agreed upon what they want, and when they have the support of the President, a tariff bill can be put through without vital changes. That is what happened in 1913.<sup>1</sup> But the ordinary vicissitudes of American politics are such that these conditions are very seldom fulfilled.

The tariff  
commis-  
sion.

In order to improve this situation we have had recourse to the expedient of a tariff commission. In 1909 Congress provided for the creation of a tariff board made up of three members appointed by the President. The duties of this board were to investigate and to report upon the condition of various American industries, their relation to the tariff, their production-costs, the rate of wages paid in such industries, and the rates paid in corresponding manufactures in other countries. But before this board could accomplish more than a small part of the work planned for it, Congress refused to continue the appropriations for its support and it went out of existence in 1912. The sentiment in favor of some such body would not down, however, and in 1916 Congress was persuaded by President Wilson to provide once more for a tariff commission. This board is still in existence. It consists of six members appointed by the President with the consent of the Senate, the appointees being drawn from both the leading political parties, one of their number being designated as chairman. Its duties are to study the tariff needs of the country from every point of view and to report annually with recommendations. It has, of course, no power to make any changes in the tariff, its functions being of an informational and advisory nature only. Even so, its work may be of the highest value in adjusting future tariffs to the actual needs of the country.

As a rule after Congress has fixed the tariff schedules absolutely no executive officer has had any power to vary them. But in the tariff act of 1921 a provision was inserted authorizing the President, under certain circumstances, to raise some of the duties by proclamation.

Congress may not impose any tariff on exports, but it can sub-

<sup>1</sup> It is true that several hundred changes were made in this measure but they did not alter its fundamental features.



sidize exports if it so desires. Shortly after the armistice of 1918 it revived the war finance corporation, one of the various war boards, and empowered it to loan government money to exporters, especially to exporters of agricultural products, thus stimulating American foreign trade. There is nothing to prevent Congress from giving direct subsidies to exports of any sort, or to ships engaged in foreign trade; but it has never adopted this as a regular policy.

No tariff  
on exports.

By virtue of its power to regulate foreign commerce Congress has also passed numerous laws relating to the immigration of aliens. These laws prescribe the conditions under which immigrants may enter the United States and exclude some classes of aliens altogether. For example, the federal laws exclude all persons, except those engaged in the various professions, who come to the United States to perform labor under contracts made before their arrival. They also prohibit, with certain exceptions, the immigration of Chinese and Japanese.<sup>1</sup> A literacy test has been provided by law for all otherwise eligible immigrants. Among those excluded under all circumstances are insane persons, those likely to become public burdens, or afflicted with serious ailments, polygamists, anarchists, and persons who have been convicted of serious crimes. And all aliens who are admitted must pay a small head tax.

The  
control of  
Congress  
over immi-  
gration.

After the close of the world war it seemed certain that an avalanche of immigration would descend upon America. Almost everywhere, throughout Continental Europe, the stream started to flow across the Atlantic. So Congress busied itself with the preparation of a new immigration law which it finally passed in 1921. The outstanding feature of this law was a provision that the total number of immigrants from any country, in any one year, must not exceed three per cent of the number of persons of that nationality who were in the United States according to the census of 1910. Thus an annual quota of immigration was for the first time established. This provision was avowedly a stop-gap, intended to stem the post-war flood, and it was to remain in force for three years only.

The three  
per cent  
law of  
1921.

In a sense it served its purpose. It kept out large numbers of immigrants who otherwise would have come. But its operations were undignified and in many cases wrought great hardship.

The two  
per cent  
law of  
1924.

<sup>1</sup> The exceptions include students, merchants, and professional men.

Ships with large cargoes raced across the Atlantic in the endeavor to reach an American port before the three per cent quotas were filled. Occasionally they arrived too late, and had to take large batches of heart-broken aliens back again. So in 1924 Congress made some radical changes in the immigration law. It reduced the quota to two per cent and ordered that it be based on the census of 1890. It set a maximum limit of 150,000 immigrants a year. The idea of basing quotas on an old census was to place a handicap upon the South European nationalities which were much less numerously represented in the United States in 1890 than in 1910 and to give a corresponding advantage to immigrants from the Nordic countries. The act of 1924 further provided for the selection of immigrants at the point of embarkation. No alien will henceforth be admitted to the United States as an immigrant unless he has obtained, before starting, a certificate or permit. These permits will not be granted in excess of the quotas, and there will be no more racing to get in before the whistle blows. The selection will be qualitative, not quantitative. Prior to the world war immigrants were coming at an average rate of a million per year. Between 1921 and 1924 the figure dropped to about 350,000 per annum. Under the law of 1924 it cannot, in any case, exceed 150,000. Finally, the new law shut out all immigration from Japan.

Congress, under its commerce power, regulates not only the admission but the deportation or expulsion of aliens. It has authorized the commissioner of immigration to deport, even after lawful admission, any alien who tries to foment revolution, or to spread anarchistic doctrines, or who gives trouble in various other ways. This power has been used on several occasions, notably in 1919 when a shipload of Russian anarchists were transported back to their own land.

The administration of all the laws relating to immigration is in the hands of a commissioner-general of immigration, an officer appointed by the President. His bureau is in the department of labor. At each port of entry for immigrants there is a board of inquiry, under his jurisdiction, and this board determines whether an immigrant is entitled to enter. If it decides that he is not entitled to be admitted, he is ordered to be deported and the steamship company bringing him in must take him away. Appeals from the decisions of these boards may be carried to the

Depor-  
tations.

How the  
immigra-  
tion laws  
are admin-  
istered.

commissioner, however, and as a last resort to the secretary of labor.

It is by means of the tariff and the immigration laws that Congress chiefly exercises its power to regulate commerce with foreign nations. But Congress also regulates commerce among the states and its work in this latter field has been equally important, or perhaps more so. Interstate commerce has been the subject of many laws which relate not only to the rates charged and the service rendered by transportation companies but to combinations in restraint of trade between the states, to unfair competition, the inspection of food and drugs, and to a multitude of other matters. And since laws are not self-enforcing, a great deal of administrative machinery has been created to see that their various provisions are duly applied.

Methods of  
regulating  
interstate  
commerce.

In the first place Congress has passed a series of laws, most of them within the last forty years, which regulate the operations of railroads and other carriers of commerce among the states. The immediate administration of these laws is entrusted to a body known as the interstate commerce commission, and from a survey of its functions one can see how extensive the regulation of internal commerce has now grown to be. The commission was established in 1887 and at the outset consisted of five members named by the President. The number of members has been increased by various statutes, until it now has eleven.<sup>1</sup> It sits in Washington and is one of the most powerful administrative agencies in the country.

The  
interstate  
commerce  
commis-  
sion :  
Its com-  
position

The functions of the interstate commerce commission include the general carrying out of the federal laws relating to steamship and railroad companies, express and sleeping car companies, telegraph, telephone and wireless companies, power transmission lines, and oil pipe companies, when engaged in interstate commerce. It may investigate, either upon complaint made to it or on its own initiative, any allegations of overcharge, or faulty service or discrimination in rates. It is authorized, after proper hearings, to fix the maximum rates to be charged and also to make reasonable rules as to service. And it has a host of other responsibilities.

Its  
functions.

<sup>1</sup>The Acts of March 2, 1889, and of February 11, 1893; the Hepburn Act of June 29, 1906; the Act of June 18, 1910, and so on. Members of the commission are paid salaries of \$10,000 per year and are appointed for seven-year terms.

The regulation of rates.

As the regulations now stand, all railway rates in interstate commerce must be reasonable (the commission being the judge of reasonability); there must be no favoritism as between different shippers or patrons, no rebates, and no discriminations against any person or locality. With certain specified exceptions no free passes may be given; and no railroad is allowed to transport any merchandise which it is itself engaged in producing. There are many other regulations applying to all companies engaged in interstate commerce. Schedules of rates must be public, kept open to inspection, and must not be changed without due notice to the commission, which may withhold its approval of the changes. All the companies must keep their accounts in the way which the commission prescribes and must make periodical reports to it. It has functions with respect to safety-appliances, workman's compensation, and the maximum hours of employment. In addition to all these things it was given, a few years ago, the task of making a physical valuation of all the railroads in order that a more intelligent determination of rates might be made possible.

Appeals from the Commission's ruling.

From the rulings of the interstate commerce commission an appeal may be taken on matters of constitutional right to the federal courts. There is no escape from the necessity of granting this right of appeal. The constitution does not permit Congress to endow an administrative commission with ultimate authority over individual rights. No law of the land may deprive a citizen or a corporation of judicial protection against a deprivation of their property. Hence the regular federal courts hear appeals from decisions of the commission whenever it is alleged that the commission's rulings have interfered with any right guaranteed by the national constitution. There are many such appeals.

The division of authority over commerce between federal and state governments.

It should again be pointed out, even at the risk of overemphasis, that the interstate commerce commission has no general authority over carriers which keep strictly within the bounds of a single state. So far as they are concerned, each state provides its own regulations and its own regulating body, commonly known as a railroad commission or public service board. This division of authority over railroads, street railways, telegraph and telephone companies has been a great source of friction and annoyance to the public and to the companies. Every large



railroad does both sorts of business, carrying some goods and passengers from one point to another within the same state under state regulation, and carrying other goods and passengers between points in different states under federal regulation. The states, moreover, regulate the organization, the capitalization, and the borrowing powers of these companies (because each obtains its charter from the state and not from the federal authorities), while the nation, through the interstate commerce commission, is usually the deciding factor in determining the revenues and the conditions of service. It even determines, in some cases, the rates charged for strictly local traffic on the ground that a transportation company's schedule of rates is a unit and must be dealt with as a whole, and the Supreme Court has upheld its authority to do this. Thus much confusion has arisen from the endeavor of two authorities to regulate the same rate schedules. Regulation can never be satisfactory until it is wholly placed in a single hand, that is until some one authority is vested with power to control the organization, borrowing powers, income, rates, service, hours of labor, and every other incident of transportation. All these problems are interwoven and no one of them can be solved without regard to the others.

On December 27, 1917, the President of the United States, by virtue of war powers conferred upon him by Congress, took over the operation of all the important railroads of the country, placing them for the time being under a director-general named by himself. In the spring of 1918 Congress by law provided that the owners of the railroads should be compensated during the period of federal operation by being guaranteed a net income equal to the average net earnings of the three preceding years. For more than a year after the end of hostilities the national government continued to operate the railroads under this arrangement, but early in 1920 Congress passed the Transportation Act under the provisions of which the railroads were restored to private operation.

In this act there are three new and outstanding features. First, it provides that the interstate commerce commission shall fix railroad rates high enough to enable the railroads in each section of the country (not *each railroad*, be it noted) to earn a net income of five-and-one-half per cent on their valuation, if properly managed. The act further provides that all net profits

Federal  
operation  
of the rail-  
roads in  
war time.

The  
Transportation  
Act of  
1920:  
Its chief  
provisions:

above the rate of six per cent upon the valuation of the railroads, as fixed by the interstate commerce commission, shall be divided in equal shares between the railroads and the government. The share received by the government is to go into a fund for the benefit of those railroads which are not able to earn the normal net income. Second, the act provides for the establishment of a railway labor board, consisting of nine members appointed by the President.<sup>1</sup> This board is given the function of hearing disputes between railroads and their employees on matters of wages or conditions of labor. After such hearings it renders its decisions, but these decisions are advisory only; they are not legally binding on either party to the dispute.

Finally, the act authorizes the consolidation of the railroads into a limited number of great systems, provided the interstate commerce commission gives its approval. This is a departure from the traditional policy of Congress which, prior to the war, aimed to hinder the railroads from amalgamating. The old idea was to keep the railroads separate and to encourage competition among them. But the government's experience in managing the railroads during the war showed that unified management could be made to produce various large economies.

From no regulation at all, forty years ago, we have now developed a system of railroad regulation by no fewer than fifty-one boards, namely, the interstate commerce commission, the railway labor board, forty-eight state boards, and a board for the District of Columbia. While the railroads of the United States are ostensibly managed by their private owners, that is, by officials and directors chosen by the stockholders of the railroads, all important questions of railroad policy are now settled by law, or by the rulings of public commissions. Those who own the railroads, and those who manage them for the owners, do not decide what rates shall be charged, what wages they shall pay, what trains shall be run, how many hours a trainman shall work, or how the railroad's accounts shall be kept. We have government operation of the railroads in America—at least in almost everything but name.

<sup>1</sup> The railway labor board was abolished in 1926. Disputes are now settled by conference between the parties concerned, or, failing this, by adjustment boards representing them. A board of mediation, appointed by the President, may intervene in any dispute, if the adjustment board is unable to arrange an agreement.

1. Rates.

2. Labor disputes.

3. Railroad consolidations.

The present situation.

The power which Congress exercises over interstate commerce has been extended not only to carriers of passengers, goods, and messages, but to industrial and commercial combinations of all sorts—trusts they are commonly called. For a hundred years after the establishment of the Republic, Congress did not interfere with these combinations, even when they seemed to be restraining interstate trade by raising prices or creating monopolies. The whole matter was left to the states, which, in somewhat intermittent fashion, enforced an old principle of the common law, namely, that all combinations which unreasonably restrain trade are illegal and may be dissolved. But this desultory work of the states was not effective, and huge monopolies began to grow up in various parts of the country, stifling competition, making arbitrary rules as to the sale of their products, and fixing prices as they pleased.

The  
control of  
trusts.

So Congress in 1890 stepped into the situation by passing the Sherman Anti-Trust Act, the first provision of which was as follows: "Every contract, or combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." This provision, it will be noted, makes no distinction between combinations which are *unreasonable* and those which are not. Going further than the common law its wording seemed to forbid all combinations in restraint of trade, whatever their nature.

The  
Sherman  
Anti-Trust  
Law of  
1890.

But no law, however drastic its provisions, is worth much unless machinery is established for enforcing it. And none was provided in this case. It was assumed that the attorney-general of the United States would attend to the enforcement of this like all other federal laws. But the attorney-general's office had other things to do, and for a dozen years or more the Sherman Law slumbered on the statute book.<sup>1</sup> Then President Roosevelt, on his accession to office, decided to get after the trusts with his characteristic vigor and instructed the attorney-general to begin prosecutions. These prosecutions were successful. In 1904 the Supreme Court rendered a far-reaching decision in the Northern Securities Case, which dissolved a virtual merger of two great

The  
Northern  
Securities  
Case  
(1904).

<sup>1</sup> In 1895 the Supreme Court decided (*U. S. v. Knight Co.*, 156 U. S. 1) that the Sherman Act did not forbid the merging of manufacturing companies.

railroads, the Northern Pacific and the Great Northern, through the agency of a holding corporation known as the Northern Securities Company. The Supreme Court held that the combination was in restraint of trade and hence in violation of the Sherman law.<sup>1</sup>

Other  
decisions  
under the  
Sherman  
Act.

Then came some other decisions, notably in the Standard Oil Company's Case (1911) and the American Tobacco Company's Case (1911), which held that these concerns were also combinations in restraint of trade and ordered their dissolution. But in rendering its decision in these cases the Supreme Court gave for the first time a definitive interpretation of the law. The court explained that the mere existence of a combination in relation to trade did not, according to the provisions of the Sherman Act, render it illegal, but that every such combination must be adjudged in accordance with its real purpose and according to whether it was a *reasonable* combination or not. Hence although it held these particular concerns to be illegal the court served notice that it would not dissolve combinations merely because they happened to restrain trade but only when it appeared that they were able and ready to restrain trade *unreasonably*. In other words, it read into the Sherman Law something that Congress had left out, implying that in its judgment Congress had not intended the omission. Therein the court was probably right; at any rate if it was wrong Congress has had plenty of opportunity to amend the Sherman Law by adding the words "whether reasonable or not," and it has never done so. The court's dictum in these cases passed into popular discussion as "the rule of reason."

Merits and  
defects of  
the Anti-  
Trust  
Law.

In its actual application the Sherman Act demonstrated the inferiority of regulation by general law as contrasted with the more flexible system of regulation by a board or commission. Not every trust or combination is harmful. There are "good trusts and bad trusts" as Theodore Roosevelt once said. Strenuous competition is not an unmixed blessing; it is often a prolific source of wastefulness so that in the end the public gains nothing from it. When the national government in 1917 took over the operation of the railroads it at once proceeded to do on a huge scale what it had always prevented the railroads themselves from doing. It put everything under central control, eliminated

<sup>1</sup> *Northern Securities Co. v. U. S.*, 193 U. S. 197 (1904).



duplications in service, cut away every vestige of competition and operated every mile of trackage as part of one giant transportation monopoly. Enormous savings were made in this way, thus demonstrating that more can sometimes be had through the elimination of competition than through the compulsory fomenting of it.<sup>1</sup> Administrative supervision such as is exercised over railroads by the interstate commerce commission, and over the banks by the comptroller of the currency, is much more effective and in the long run more salutary from the public point of view than the sweeping prohibitions of any law can ever hope to be.

Not until 1914, however, did Congress fully appreciate this point. Then it enacted the Clayton Act, which, although it did not repeal the Sherman Law, placed the whole matter of trust regulation on a simpler and saner basis. It also provided for the establishment of a board known as the federal trade commission, with five members appointed by the President. Its functions are twofold. In the first place it is charged with the duty of enforcing the laws against any combination which, in its judgment, is unreasonably restraining interstate trade. In the second place it has the function of preventing unfair competition in foreign or interstate trade by manufacturers or manufacturing corporations or any other concerns except banks and common carriers. The latter are under separate federal supervision, one under the comptroller of the currency and the other under the interstate commerce commission. The federal trade commission may, after due investigation and hearings, issue orders designed to prevent unfair competition, but appeals from such orders may be taken to the Circuit Court of Appeals and from its decision, again, to the Supreme Court. It may also report cases to the attorney-general's office for prosecution.<sup>2</sup>

The Clayton Act (1914) and the federal trade commission.

These, in brief, are the powers and instrumentalities of the national government with respect to commerce. Lest a misleading impression has been given let it be repeated, however, that federal jurisdiction in many of these matters is not exclusive; the several states have some powers even with respect to foreign and interstate commerce. The constitution permits a state to lay

The extent to which the states may restrain commerce.

<sup>1</sup>It more than offset all these economies, however, by increasing the number of employees, raising wages, and making extravagant allowances for overtime work.

<sup>2</sup>The Clayton Act provided that labor, agricultural and horticultural organizations should not be deemed to be combinations in restraint of trade.

Police  
power in  
its relation  
to inter-  
state trade.

duties on imports or exports whenever such "may be absolutely necessary for executing its inspection laws," but it may not use this power as a means of obtaining revenue. Moreover, the Supreme Court has consistently upheld the doctrine that reasonable state laws for the protection of the public safety, health, and morals, even when they operate to restrain interstate commerce, are valid. Thus a state may establish its own quarantine, may prohibit the operation of freight trains on Sundays, may regulate the maximum speed of trains, may require that grade crossings be guarded, and so on, even though such regulations interfere with carriers engaged in interstate commerce. The state regulations must be reasonably designed to protect its own citizens and no more; they cannot interfere with interstate commerce on any other ground.

The regulating power of Congress over foreign and interstate commerce, therefore, while paramount whenever exercised, is not exclusive. When a state, for example, makes laws for the sanitary protection of its harbors, these laws apply to foreign merchant vessels in port, and if they are not in conflict with laws made by Congress they are held to represent a reasonable exercise of the state's police power.<sup>1</sup> What the constitution requires is that the states shall not set out to determine the course of commerce and that they shall not, under color of their police power, undertake to raise revenues from any form of commerce which is not wholly carried on within their own boundaries. Within this latter sphere the states may tax, license, regulate, or even prohibit as they see fit, provided they do not order a deprivation of property without due process of law or deny to any one the equal protection of the laws.<sup>2</sup>

<sup>1</sup> "The fact that state regulations adopted in the exercise of the general police power may incidentally affect foreign commerce does not render such state regulations necessarily invalid. If they are not unreasonable, nor calculated to effect a discrimination, and do not in substance amount to general regulations of such commerce as is placed within the control of Congress, they will be upheld." Emlin McClain, *Constitutional Law in the United States* (2d ed., N. Y., 1913), p. 153.

<sup>2</sup> A great deal of material is available for the study of the commerce power of Congress, including more particularly the annual reports of the interstate commerce commission, the railway labor board, the federal trade commission, the tariff board, and the commissioner-general of immigration. Books on various phases of the subject there also are in plenty, so many of them, in fact, that it is impracticable to list even a selection of them here. The titles may readily be found by looking under the appropriate headings in the subject catalogue of any library.

## CHAPTER XX

### THE WAR POWERS

Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The power requisite for attaining it must be effectually confided to the federal councils.—*James Madison.*

Seven specific grants of war power to Congress appear in the constitution, namely, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, to provide for calling forth the militia to execute the laws of the nation, to provide for organizing, arming, and disciplining the militia, and to exercise exclusive legislation over places acquired for forts, magazines, arsenals, dockyards, and other needful buildings. Among the eighteen clauses of the constitution which enumerate the powers of Congress, therefore, more than one-third deal with the various branches of military and naval authority.<sup>1</sup>

Scope of  
the war  
powers.

Congress alone can declare war, but a formal declaration is not an essential preliminary to the outbreak of hostilities. Such declarations are customary among nations, but no rule of international law requires them. Declarations of war are not issued primarily for the benefit of the adversary but for the information of neutrals so that they may observe the rules of neutrality and

1. The  
power to  
declare  
war.

<sup>1</sup>The exact wording of these various clauses is as follows: "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years."

"To provide and maintain a navy."

"To make rules for the government and regulation of the land and naval forces."

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

keep out of the way. Not infrequently a declaration of war is issued after the hostilities have actually begun, as, for example, in the Spanish-American War of 1898. When Congress does act, however, a declaration of war is usually embodied in a resolution passed in both Houses and signed by the President. This resolution recites the reasons for the resort to arms and ends by declaring that a state of war exists.

2. The power "to raise and support armies."

The power "to raise and support armies" is vested in Congress without any limitation save that no appropriation of money for this purpose shall be made for a longer term than two years. In other words no Congress may commit succeeding Congresses to a program of military expenditures. In all other respects, whether as to the size of the army, the method of recruiting it, or the measures necessary for supporting it, Congress has unlimited discretion. This wide latitude was wisely given because no one could foresee the dangers with which the Union might some day be confronted, although it was assumed that no standing army of any considerable size would ordinarily be required.

The regular army.

During Washington's two terms as President the army of the United States (as distinct from the militia of the states) never exceeded five thousand of all ranks. But even this was regarded by the anti-Federalists as too large, and in 1798 the legislature of Virginia, under the inspiration of Jefferson and Madison, voted that "our security from invasion and the strength of our militia render a standing army unnecessary." The danger of a war with Napoleonic France, however, soon led to a temporary increase in the size of the regular forces. During the War of 1812 Congress authorized the raising of about thirty-five thousand men by enlistment in the army, but men did not enlist readily and the war was fought chiefly by the militia called into the national service. After peace had been made in 1815 the regular army again dropped in numbers and was not then substantially increased until a few years prior to the War with Mexico. Even in the Civil War the strength of the regular army was not raised to any formidable proportions. By far the greater portion of the fighting forces were obtained by calling out the militia of the several states and by organizing volunteer regiments. After the war the maximum size of the regular army was fixed at twenty-five thousand, a figure which was raised to sixty-one thousand for the Spanish War in 1898. Thereafter it continued to range

The volunteer forces.



between sixty and one hundred thousand until after the outbreak of hostilities in Europe when comprehensive measures for its further increase were taken. The regular army has always been recruited by voluntary enlistment. It has never contained any units raised by conscription. It is, as its name implies, a permanent establishment, composed of trained officers and men who give their entire time to the service.<sup>1</sup>

Although the regular army, upon the participation of the United States in the European War, was recruited by enlistment to the highest figure in its history, and although the organized militia of the various states was called into the federal service, the bulk of the expeditionary forces were raised by the application of the so-termed Selective Service Law, passed by Congress in 1917.<sup>2</sup> This act, with its amendments, provided at first for the selective conscription of male citizens between the ages of twenty-one and thirty-one and later for an extension to include all between the ages of eighteen and forty-five. A registration of all such persons was ordered and the first increment of the new army was drawn from the lists by lot after a due apportionment of the required number had been made among the states. For subsequent increments, however, all registrants were divided according to their circumstances into various classes, the first class including physically fit persons without dependents, not engaged in essential employments. Selections were then made from the first class. The entire work of selecting men for the army was performed under the supervision of the provost marshal general, an official of the war department, assisted by civilian draft boards in all parts of the country.

The national army.

The power "to raise and support armies" gives to Congress in war-time an authority over every branch of national life which is well-nigh unlimited. When an army is in training or in the field every branch of commerce or industry, even the home life and habits of the people, may be placed under any necessary restraint to facilitate its "support." It was by virtue of this authority that Congress, in 1917, empowered the President to establish food and fuel administrations with authority to regulate

Scope of the power "to support armies."

Control of the food and fuel supply.

<sup>1</sup> The strength of the regular army of the United States is fixed from year to year by the size of the appropriations made by Congress. It is now (1925) about 125,000 of all ranks, together with about 7,000 Philippine Scouts.

<sup>2</sup> Approved by the President, May 18, 1917; amended August 30, 1918.

Operation  
of the  
railroads.

The ship-  
building  
program.

supply and to control consumption. It is by virtue of this authority "to support armies" that the compulsory shutting down of industries for short periods was decreed. The taking-over of the railroads likewise came within the scope of the power. That action may also be within the power which Congress possesses to regulate commerce; but there was no need to have recourse to that interpretation. The war authority is broad enough to cover it. The huge shipbuilding program upon which the nation embarked in 1917 is also within the same category. In time of peace the commerce clause might be invoked to validate the construction, ownership, and operation of merchant vessels by the national government, although it is not certain that it could be invoked successfully. But so long as the nation is at war there appears to be very little, if anything, in the way of construction, conservation, or regulation that Congress cannot control. The last ounce of national energy may be necessary to support the armies; if so, Congress may call for it.<sup>1</sup> This is as it ought to be. The framers of the constitution acted with great foresight when they set no shackles upon the national government in time of war.

3. The  
power  
"to pro-  
vide and  
maintain  
a navy."

Power "to provide and maintain a navy" is also given to Congress, in this case without any restriction as to the period for which appropriations may be made. The naval authority includes the right of Congress to make rules for the general administration of the sea forces, including the organization of the navy department and its various technical bureaus. It also authorizes the voting of money for the construction of vessels, the determination of the type of ships to be built, the provision of navy-yards and repair depots, and the entire general direction of the nation's naval policy. While the immediate direction of the navy is in the hands of the President as its commander-in-chief, acting through the secretary of the navy, the organization and general policy are both within the jurisdiction of Congress.

4. The  
power to  
make rules  
for the  
land and  
sea forces.

The authority to "make rules for the government and regulation of the land and naval forces" is also devolved upon Congress by the constitution. The general rules for the government of the land forces are contained in the Articles of War. The

<sup>1</sup>Under authority vested in the President by Congress many important boards and commissions were created during the years 1917-1918. Among these may be mentioned the War Industries Board, the Emergency Fleet

navy is also governed by a general code of regulations which Congress has enacted. These codes of rules, enacted by Congress for the government of the land and naval forces, make up that branch of jurisprudence which is commonly known as military law, the law which is administered by courts-martial.

Military law : what it implies.

Military law should be clearly distinguished from martial law, for it applies only to persons who are in the military or naval service. Martial law is a term used to designate the government of any territory when the ordinary civil administration is superseded by the military authorities. When martial law is proclaimed, the ordinary laws and courts are no longer paramount: the military authorities prescribe the rules and administer them for the time being. Martial law applies to the inhabitants of the area in which it is proclaimed. It may, but does not necessarily, include within its scope the members of the armed forces.

Distinguished from martial law.

Martial law may be proclaimed in any area at any time by Congress, or by the President if such action is urgently required before action by Congress can be had. It is not proclaimed except in case of invasion, grave disorder, civil or foreign war, and then only in districts where the ordinary law proves itself unable to secure the public safety. There are no prescribed rules of martial law. The orders of the officer commanding the military forces, when duly promulgated, are to be obeyed and their disobedience may be summarily punished by the military authorities. In other words martial law is not a statutory code but is made up of the day-to-day regulations which are rendered necessary by the exigencies of military control. Special military tribunals, which should be distinguished from courts-martial, are established to administer martial law if necessary; but occasionally the existing courts are retained. Martial law was administered on an extensive scale over large sections of territory during the Civil War.

What martial law means.

Corporation, the Shipping Board, the War Labor Board, the War Labor Policies Board, the War Trade Board, the Council of National Defence, the Federal Board for Vocational Education, the Bureau of War Risk Insurance, the Committee on Public Information, the Censorship Board and the War Finance Corporation. Some of these were created for the duration of the war only, but others, like the Shipping Board, have been continued in existence. On the organization and work of these various boards see W. F. Willoughby, *Government Organization in War Time* (New York, 1919).



Limitations on martial law.

While the establishment of martial law in any area deprives the inhabitants of their ordinary civil law and civil courts it does not of itself withdraw from them the constitutional rights of citizens. Military as well as civil officials are bound by the constitution and the substitution of martial for ordinary law does not change the relation between the individual and the nation. The privilege of the writ of habeas corpus is not suspended by the mere proclamation of martial law. This suspension must be specifically made and in a strictly legal sense it can only be made by Congress although the suspension was ordered during the Civil War by the President.<sup>1</sup> The privilege of this writ enables any one held in custody to obtain a speedy hearing before a regular court; its suspension means that a prisoner may be held indefinitely without a hearing. The constitution requires, accordingly, that this privilege be not suspended except when in case of rebellion or invasion the public safety demands it, but it does not expressly designate that Congress or the President shall decide whether this situation exists.

Military government.

When territory is conquered and held by an invading force it is usually given, for the time being, a military government. This, again, should be distinguished from the administration of martial law, for while the establishment of military government involves the superseding of the old sovereignty it does not usually abrogate the existing legal system. A military government, for example, was established by the United States in Porto Rico after its conquest from Spain in 1898, and remained in charge of the island until Congress made provision for a civil administration, but martial law was not proclaimed, nor was the old Spanish jurisprudence at once abrogated. A military government was also set up by the United States in the zone occupied by the American troops on the Rhine during the years following the armistice of 1918. Here also the local authorities were left in charge of routine civil functions, subject to supervision by the American military authorities.

Military law, martial law, and military government, accordingly, are three quite different things although they are often

<sup>1</sup>The Supreme Court, on this occasion, held that the President did not have the right to suspend the writ. *Ex parte Merryman*, (1861) Taney's Reports, 264. Congress, in 1863, passed a statute validating the President's act. It is now agreed that only Congress can authorize the suspension.



confused. The first, which applies during peace as well as during war, includes within its jurisdiction only members of the land and naval forces. It is the system of law which the courts-martial enforce. The second replaces the ordinary civil law whenever, either in peace or war, the ordinary administration proves inadequate to maintain the public safety. It applies to all the inhabitants of the area in which it is proclaimed. The third, military government, is a form of rule temporarily set up in conquered or occupied territory.

When the military provisions of the federal constitution were being agreed upon, it was taken for granted that a well-regulated militia rather than a standing army ought to be the backbone of national defence. The militia of the colonies had done good service during the French Wars and in the Revolution. The dread of a standing army, which had been so long a bugbear of public opinion in England, was quite as strong in America, hence the prominence given to the militia in 1787 "as the only substitute that can be devised for a standing army and the best possible security against it."<sup>1</sup>

As defined by the national laws the militia includes all citizens between the ages of eighteen and forty-five, and this entire force is legally subject to the call of the President to enforce the laws, to suppress insurrection, or to repel invasion; but in actuality only a small portion of this body is regularly organized into the militia or national guard of the several states.

The constitutional status of the militia is somewhat complicated, and widespread misunderstanding exists concerning it. The militia, as such, cannot be used outside the United States. The constitution allows the federal authorities to call out the militia for three purposes only, "to execute the laws of the Union, to suppress insurrections, and to repel invasions," none of which operations contemplate service on foreign soil.

The National Defence Act of 1916 provides, however, that the President may "draft into the military service of the United States" any or all members of the national guard whenever Congress authorizes the use of armed forces in excess of the regular army. This "federalizing" the militia regiments makes them no longer militia but units in the army of the United States. It takes them wholly out of the jurisdiction of the state authorities.

<sup>1</sup> *The Federalist*, No. 29.

5. The power to call forth the militia.

Who constitute the militia?

Legal status of the militia.

Mustering the militia into the federal service.

6. The power to control the organization, arming, and disciplining of the militia at all times.

During periods when the militia are not in the service of the United States the constitution provides for a division of control. Congress has power to provide for the "organizing, arming, and disciplining" of the militia, but "the appointment of officers and the authority of training the militia according to the discipline prescribed by Congress" are matters which are expressly reserved to the states. The reasons for this divided control, which does not make for efficiency, are to be found in the public sentiment of the country as it existed when the constitution was framed. The states were then very jealous of their military privileges and would not have tolerated the complete supremacy of the new national government over all the armed forces of the country. On the other hand it was obvious that if each state was left entirely to itself in the matter of organizing, arming and drilling its militia the country would never be able, in time of emergency, to call forth a homogeneous army. Accordingly the national government was given such authority, and only such authority, as would suffice to secure the necessary uniformity in the militia systems of the several states, while the states themselves were allowed to retain the reins of direct control, including the appointment of all militia officers. This latter right was the one upon which the states laid the greatest emphasis.

The exercise of this control.

As early as 1792 Congress passed the first act for "organizing, arming, and disciplining" the militia, and this statute continued in effect without very material changes until 1903, although the various wars of the nineteenth century showed that most of its provisions were absurdly inadequate. In this year a general measure for the improvement of the militia was passed by Congress. Provision was made for supplying all militia with the same uniforms and equipment, also for their instruction by officers of the regular army and for a periodic inspection in the interests of efficiency. An important stipulation of this act was that militia units might be mustered into the federal service in time of war by a procedure therein set forth. A few years later (1908) Congress provided for the distribution to the states of an annual grant to assist them in the maintenance of their militia, and in 1916 various other changes were made, chiefly in the direction of accentuating the federal government's control.<sup>1</sup>

<sup>1</sup> These provisions were embodied in the National Defence Act (approved June 3, 1916) which includes various provisions relating to the disciplining

While the division of military authority, as provided for in the constitution, was a necessary concession to the states and could not have been avoided, its practical workings have been far from satisfactory. The federal government makes the rules of organization and discipline, but these can never be effectively put into force so long as the states appoint the militia officers. In many of the states the appointment of these officers has been largely a matter of personal and political favoritism, with little regard for the military capacity or experience of the persons appointed. The annual training of the militia, extending over a few days only, has been the occasion of large expenditures without very substantial results. The militia of the United States will not be an effective force until its entire control, both in peace and in war, passes into the hands of the federal government.

Weakness  
of the  
militia  
provisions.

In various parts of the country the national government has acquired land for the construction of navy-yards, forts, arsenals, and other military or naval works. Over such property, the constitution provides, Congress may "exercise exclusive legislation"; in other words, Congress alone may make laws relating to such areas. The military and naval works of the United States are not subject to taxation by the states in which they happen to be located, nor may the states apply to them any restrictions inconsistent with a proper fulfilment of the purposes for which such works are constructed. They are to all intents and purposes federal areas, outside the legislative jurisdiction of the states. No property may be acquired by the national government in any state for military or naval purposes, however, without the consent of the state legislature.

7. Powers  
over  
forts,  
arsenals  
etc.

On the whole the war powers of Congress have proved ample. If demonstration of this fact were needed it was forthcoming during the years 1917-1918. During the relatively short space of eighteen months the United States raised an army of nearly four million men, transported more than two million men overseas, equipped and provisioned this stupendous array, and turned the scale in the great conflict. So the chief lesson to be drawn from America's participation in the World War is this: that the mili-

of the state militia, the qualifications and pay of officers and men, and as to closer federal supervision. This legislation may be found in John H. Wigmore's *Source Book of Military Law and War-Time Legislation* (St. Paul, 1919), pp. 384-444.



What  
"prepared-  
ness"  
means.

tary strength of a nation does not depend upon the size of its standing army, or its *preparedness* in the narrow sense. If a country builds up a vigorous manhood, both physically and mentally; if it creates great, varied, and well-managed industries; if it fosters patriotism and a sense of righteousness through its system of public education; if it cultivates intelligently all the progressive arts of peace—if a nation does all these things, it is accomplishing real preparedness for whatever may come. Great wars are won, paradoxical as it may sound, in times of peace.

War and  
the bill of  
rights.

There is an ancient Latin maxim: *inter arma silent leges*. It means that under the stress of armed conflict the laws and the rights of the citizens must give way. In the United States this maxim does not apply; the constitutional rights of the citizen remain intact and the ordinary laws of the land continue to operate in war-time. Nevertheless it is true that a state of war requires strict vigilance on the part of the government and this may lead it to lay various restrictions upon individual freedom which would not be imposed in time of peace. During the world war, for example, Congress passed the Espionage and Sedition Acts which provided penalties for making or circulating false statements with intent to injure the United States, or for using "abusive language about the government or institutions of the country." In some quarters this legislation was regarded as an unwarranted interference with freedom of speech.<sup>1</sup> Yet those who found their personal freedom restricted by the Espionage and Sedition Acts suffered very little hardship compared with that borne by the soldiers and sailors who went into active service. In any event the issue is one which cannot be argued in general terms, for it is not a question of principle but of practical policy. Everybody agrees that people ought to have reasonable liberty to express their own thoughts in their own way; on the other hand it is just as fully agreed that people must not be allowed to go about preaching treason, uttering slanders, and by word of mouth infringing the rights of others. The question, then, is not whether we should grant freedom of speech or deny it; but how much of it we should grant or deny. In a democracy the presumption should be in favor of freedom. It should be curtailed no further than is clearly required by the public safety. But war inflames popular passions and may impel a government,

The  
Espionage  
and  
Sedition  
Acts.

There can  
be no  
absolute  
freedom  
of speech  
at any  
time.

<sup>1</sup>Zechariah Chafee, Jr., *Freedom of Speech* (New York, 1920).



most of all a popular government, to do unwise things. An excited nation, like an excited man, is entitled to leniency. We ought not to judge the liberties of the citizens by what happens to them in war time.

## CHAPTER XXI

### SOME MISCELLANEOUS POWERS OF CONGRESS

Whatever it (Congress) takes to itself, though at first unwarrantable, helps to make it over into a new instrument of government, and it represents at last the acts done under it.—*Thomas M. Cooley.*

The  
secondary  
powers.

Of the great powers granted to Congress by the national constitution the five most important (namely the power to tax, to spend, to borrow, to regulate commerce, and to carry on war) have been discussed in the preceding chapters. There are a dozen other powers possessed by Congress and some of them are of far-reaching significance; but limits of space do not permit their being dealt with extensively in this book. Nor is a detailed knowledge of these powers necessary to a reasonably clear grasp of the main principles. A statement of these remaining powers, with a few comments upon the scope of each, must therefore suffice.

1. Power  
over the  
currency.

Congress is given power by the constitution to coin money. The power to coin money belongs to the federal government alone; it is prohibited to the states. The framers of the constitution made this arrangement advisedly, for they were familiar with the monetary chaos which had resulted from the right of each state to issue its own coinage and paper. Immediately after the formation of the Union a mint was established at Philadelphia (1792) and other mints have since been located at Denver, San Francisco, and New Orleans. Provision was also made for adopting the decimal system, with eagles, dollars, dimes, and cents. The ratio of gold was fixed at fifteen to one, that is to say the weight of the silver dollar was made fifteen times that of the gold dollar. But changes in the supply of the two metals and in their market value made a change necessary, and the ratio of sixteen to one was adopted in 1834. This ratio continued until 1873 when the coinage laws were entirely revised and the minting of silver dollars discontinued. Gold alone now became

the standard of values. The country passed from a bimetallic to a gold basis. But vigorous opposition at once developed, with the result that in 1875 Congress restored the silver dollar to the list of legal tender coins, and in 1878 the minting of silver dollars in limited quantities was resumed. This policy continued until 1890, when an increase in the coinage of silver was provided for, but the continued decline in the market price of that metal led to the complete discontinuance of further silver purchases for coinage.

This action of Congress divided the two great political parties on the issue of free silver. The Democrats, under the leadership of Mr. Bryan, fought the election campaign of 1896 on a platform which demanded the free and unlimited coinage of silver dollars at a ratio of sixteen to one. The Republicans, on the other hand, supported the monometallic or single gold standard. The Republican victory at this election did not end the free silver agitation, but it virtually insured the continuance of the gold basis, and the matter was definitely settled by the Gold Standard Act of 1900. Into the economic merits of this famous controversy it is not necessary to proceed; but the question bulked large in political discussion during the decade 1890-1900.<sup>1</sup> Silver dollars continue in circulation, but they are not a basis of the currency. The gold dollar, which is no longer coined at all, is the legal standard of values in the United States.

The  
conflict  
over bimetal-  
lism.

Congress is not given any express authority to issue paper money; the constitution ignores this point, although it definitely forbids any of the states to "emit bills of credit." It has been held, however, that Congress may not only issue paper money as an incident of its borrowing power, but may make such notes legal tender in payment of debts. During the Civil War large issues of "greenbacks" were made by the national government, and in order to float them Congress declared these notes to be legal tender for all payments except customs duties and interest on government bonds. For a time it was a moot question whether Congress had any right to do this, but the Supreme Court finally decided in 1871 that the action came within the scope of the implied powers.<sup>2</sup>

The  
legal  
tender  
issue.

<sup>1</sup>J. L. Laughlin, *History of Bimetallism in the United States* (4th ed., N. Y., 1900), and F. W. Taussig, *The Silver Situation in the United States* (3d ed., N. Y., 1898).

<sup>2</sup>*The Legal Tender Cases*, 110 U. S. 421.

The  
present  
welter of  
currency.

The present currency of the United States falls into at least eight classes: (1) gold coin, minted at various times in denominations from one to twenty dollars; (2) silver dollars, fractional silver (half-dollars, quarters, and dimes), and fractional small coins (nickels and cents); (3) gold certificates issued against deposits of gold bullion held in the federal treasury; (4) silver certificates backed by silver bullion and silver coin similarly held; (5) United States notes or "greenbacks," and treasury notes, both of which are redeemable in coin; (6) national bank notes, which are protected by deposits of government bonds, (7) federal reserve notes issued against the security of commercial paper, which are gradually replacing the gold certificates; and (8) federal reserve bank notes secured by government bonds which are replacing the national bank notes. This is a wider variety of currency than can be found in the peace-basis circulation of any other great country. Yet it is not to be assumed that there would be any great advantage in reducing it all to the same type. So long as it is all maintained at par, so long as every paper dollar is worth its face value in gold, the variety of the notes causes no inconvenience. Nobody ever looks to see whether the paper notes that he obtains at the bank cashier's window are based upon gold, or silver, or government bonds. Nor does he care whether they are "legal tender" according to the laws of the land.

The  
punish-  
ment of  
counter-  
feiting.

Congress has power to provide for the punishment of counterfeiting either the money or the securities of the United States or those of foreign countries, but this does not preclude the punishment of such offences by state laws as well. As a rule, however, these offences are left to be dealt with by the federal courts. The wilful uttering of counterfeit money or notes, apart from the actual counterfeiting, is commonly made an offence by state law and punished by the state courts.

2. Power  
to regulate  
weights  
and  
measures.

Congress also has full power to fix "the standards of weights and measures." Many laws were put upon the statute books relating to this subject during the course of the nineteenth century, but no comprehensive attempt was made to deal with weights and measures in a scientific way until 1901, when the bureau of standards was established in Washington to undertake the work of securing accuracy and uniformity. This bureau now supplies the various states with standards of mathematical exactness. The inspection of weights and measures, on a basis of their



conformity to these standards, is in the hands of state and municipal authorities.<sup>1</sup> The old English standards (pound, bushel, yard, gallon, and their derivatives), somewhat modified, are in general use throughout the country, as everyone knows, but it is not so generally known that the metric system was also made legal by Congress more than fifty years ago and may be used by those who prefer to do so.

Then there is the postal power, or as the constitution puts it, the power "to establish post-offices and post-roads." "No other constitutional grant," as one distinguished writer has remarked, "seems to be clothed in words which so poorly express its object or so feebly indicate the particular measures which may be adopted to carry out its design."<sup>2</sup> The reason, perhaps, is that the framers of the constitution merely sought to perpetuate in central hands a power which was already there and which in its actual workings was well understood by everybody. The postal system of the country is older than the federal government itself, extending back into colonial times. In the interval between the outbreak of the Revolution and the adoption of the constitution it was first managed by the Continental Congress and later by the Articles of 1777 it was given to the Congress of the Confederation.

3. The postal power.

By virtue of its postal power the national government not only maintains the country's elaborate network of post-offices and delivery routes but conducts a great parcels-post business, a money-order service and a savings bank system. It likewise exercises a considerable degree of control over certain lines of business by virtue of its power to refuse the use of the mails to any concern which has been found to use the service fraudulently. This is done by the issue of "fraud orders." The right to deny the use of the mails represents a large power, capable of wide extension and fraught with possibilities of serious abuse. Many years ago the Supreme Court sustained the right of postal authorities to exclude from the mails any matter that they deem objectionable, and also declared that no state might establish a postal system in competition with the federal government. Congress

What it includes.

"Fraud orders."

<sup>1</sup> Not merely pounds and bushels and yards, of course, but technical standards of every sort—amperes, ohms, watts, and all the rest.

<sup>2</sup> J. N. Pomeroy, *An Introduction to the Constitutional Law of the United States* (10th ed., Boston, 1888), Section 411.

may likewise delegate to the postmaster-general the right to determine what matter shall be so excluded, and this delegated authority is not subject to review by the courts. Decisions of the postmaster-general, in the case of fraud orders, are final and conclusive. The denial of the right to use the mails is not a deprivation of property, for no one can acquire a right in postal facilities that would be paramount to the proper management of the service.<sup>1</sup>

How far  
does the  
postal  
power  
extend?

Does the  
phrase  
"post-  
roads"  
include  
railroads?

The  
Supreme  
Court's  
answer.

The power to establish and maintain "post-roads" is an authority which has thus far been drawn upon to only a small extent, yet it might well be utilized to amplify the functions of the federal government in an enormous degree. The original intention was merely to vest in Congress the right to build and maintain roadways if that should be necessary to facilitate the carrying of mail from one town to another. But mails are not now for the most part carried by wagon or even by motor trucks; they are handled by the railways. To interpret the term "post-roads" as including railways would involve no greater stretching of a constitutional phrase than that which the Supreme Court permitted when it included telegrams and telephone messages within the word "commerce."

In his message vetoing the Cumberland Road bill in 1822 President Monroe asserted that Congress had no power under the constitution to embark upon a policy of highway construction by virtue of its postal authority, but that the postal service must use the existing roads provided by the states. That doctrine, however, has long since been repudiated. The power of Congress to construct roads within the limits of the states has been held by the Supreme Court to be implied not only in the "post-roads" clause of the constitution but also in the authority to regulate commerce.<sup>2</sup> Congress, if it does not choose to build the roads as a national enterprise, may grant subsidies to the states for road-building and this it has done in recent years.

4. Power  
to grant  
patents.

Again, Congress is given power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," in other words to grant patents and

<sup>1</sup>For a survey of the postal authority in its legal phases, see Lindsay Rogers, *The Postal Power of Congress* (Baltimore, 1916), especially ch. vii.

<sup>2</sup>*California v. Central Pacific R. R. Co.*, 127 U. S. 1.

copyrights. A patent is a certificate given to an inventor, securing for him during a designated term of years the exclusive right to make such profits as there may be in his invention. The issue of patents is in the jurisdiction of the patent office, a bureau in the department of the interior. The rules relating to them are elaborate and complicated.<sup>1</sup> A patent is valid for seventeen years during which time the holder is protected by the courts against infringement. Trade-marks have no necessary relation to inventions or discoveries and do not come within the power to issue patents or copyrights. But trade-marks used in interstate commerce may be registered at the patent office. When intended for use in trade within a single state they can be protected only by state registration. It should be mentioned, moreover, that the granting of a patent does not give an inventor the right to manufacture or to sell his invention except under such conditions as the police power of the states may impose. Even patented articles, if dangerous to the safety, health, or morals of the community, may be excluded by the laws of any state. The imposition by the states of a license fee for the sale of any article, moreover, applies as well to patented merchandise as to any other. The right to manufacture or sell is not derived from the patent and is neither increased nor diminished thereby.

A copyright secures exclusive rights to publish and sell any book, manuscript, musical composition, drawing, photograph, or similar matter having inherent value. The present term of a copyright is twenty-eight years with the opportunity for a further renewal during an equal term. To obtain copyright in the United States a book must be actually typeset in this country; but this does not apply to books in languages other than English.<sup>2</sup> Many attempts have been made to secure some form

5. Power  
to issue  
copyrights.

<sup>1</sup>Here are a few general provisions: The applicant for a patent must make a sworn statement that he believes himself to be the original inventor of the article or process which he seeks to patent; he must submit descriptions and drawings, also a model if required; and must pay a fee. Not everything new can be patented; it must be both "new and useful." It must be something "not patented or described in any printed publication in this or any foreign country prior to the invention and not in public use or on sale in the United States for more than two years prior to the application." When applications come in they are referred to examiners in the patent office, and if a patent is issued, another fee is exacted.

<sup>2</sup>Application for copyright is made to the librarian of Congress. The fee is only one dollar, but two copies of the copyrighted publication must be given to the library.

of international copyright so that an author may have protection in all countries, and some progress in this direction has been made by means of treaties.

**6. Powers in connection with naturalization and bankruptcy.**

Congress has power to establish uniform rules upon two other subjects, naturalization and bankruptcy. The procedure in naturalization has been already explained. Over the rules as to citizenship Congress has complete and exclusive jurisdiction, having fully covered the matter by law.<sup>1</sup> As regards bankruptcy laws, or laws which provide for the distribution of a debtor's assets among his creditors after he becomes insolvent, Congress has not assumed jurisdiction to the exclusion of the states, but where any state law conflicts with a provision of the National Bankruptcy Act of 1898, it becomes invalid. The present national law provides for both voluntary and involuntary petitions in bankruptcy. In the former cases the insolvent himself files a petition in a federal district court and officials are appointed by the court or elected by his creditors to take over his assets; in the case of involuntary petitions the application is made by one or more of the insolvent's creditors. After the assets have been liquidated the insolvent may under certain conditions obtain from the court a discharge from bankruptcy which relieves him of further legal liability with respect to all debts unpaid at the time of filing the petition. For the security of credit it is obviously desirable that the rules relating to bankruptcy should be uniform throughout the country.

**7. Power to establish subordinate courts.**

Congress is given power to "constitute tribunals inferior to the Supreme Court"; in other words, to provide a system of subordinate federal tribunals. The Supreme Court is the only federal tribunal which the constitution expressly mentions; the other courts were left to be organized at the discretion of Congress, under the general provisions relating to the security of judges in tenure and salaries. By virtue of this power Congress has established the system of district and circuit courts which are described in a later chapter, and has allotted to them their respective spheres of jurisdiction.

**8. Powers in relation to the high seas.**

"To define and punish piracies and felonies committed on the high seas, and offences against the law of nations" is another power granted to Congress. The high seas are the waters outside the three-mile limit, or, to speak more accurately, beyond a

<sup>1</sup> See *above*, pp. 89-97.



distance of one marine league. International law recognizes that the territorial jurisdiction extends to this distance from the shore, but beyond this limit the salt waters of the earth are the "high seas" over which all are free to travel in time of peace without restriction.<sup>1</sup> Over American vessels on the high seas the federal government has sole jurisdiction. Piracy is now a thing of the past; it was the offence of committing depredations at sea without color of authority derived from any government. Regarded as the common enemy of all mankind, a pirate may lawfully be captured by anyone on the high seas and punished in any country. Offences against the "law of nations" or against the rules of international law are for the most part breaches of neutrality. Congress has defined the duties of American citizens when other countries are at war and forbids the commission of unneutral acts on American territory, as, for example, organizing armed expeditions or fitting out armed vessels in aid of a belligerent power. Such "offences against the law of nations" are punished by the federal courts.

As for the national government's authority to issue letters of marque and reprisal, in other words to grant authorizations to privateers or predatory private vessels—that authority, although granted by the constitution, is of no consequence to-day. For while the United States has never, like all the chief European states, formally relinquished the right to use privateers in time of war, the practice of privateering has long since been abandoned and will never again be revived. The rules of international law are not always exact and definite; although most of them are sufficiently so to permit their being properly applied. But international law, unlike the law of a single country, has no single tribunal with authority to enforce it.<sup>2</sup> The federal courts of the United States apply the rules of international law only where the controversy arises within American jurisdiction.

The question of a national capital gave the makers of the constitution some trouble. The prize was coveted by various cities, both north and south, and the members of the constitutional con-

9. Exclusive jurisdiction over the national capital.

<sup>1</sup> Nations may by treaty, however, permit one another to exercise jurisdiction for certain purposes (e.g. the enforcement of their smuggling laws) beyond the three-mile limit.

<sup>2</sup> There is a World Court, established by the Covenant of the League of Nations; but the United States is not yet a party to the protocol of this court.

vention did not dare to make a decision. To avoid an embarrassing difficulty, therefore, the whole matter of selecting a capital was left to be decided by Congress after the constitution should go into operation. It was felt that an entirely new city should be founded to serve as the seat of national government, and with that idea in mind provision was made for creating a small district completely under national control. In establishing the District of Columbia, Congress later availed itself of this power "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The jurisdiction of Congress over this area is complete. As will be seen later, the District of Columbia has no system of local self-government, and Washington is the only large municipality in the country of which that can be said.<sup>1</sup>

10. The  
"implied  
powers."

Finally, there is the national government's right to make all laws which shall be necessary and proper for carrying any of its general powers into execution. This is sometimes referred to as the "implied powers clause" of the constitution, or as vesting in the national government a "coefficient power." Laws are the agencies through which all the powers granted by the federal constitution to the Congress of the United States are carried into effect. The exercise of every Congressional power requires a law. The law adds nothing to the scope of powers already possessed; it merely makes the powers effective. Where a power is granted, the right to carry it into effect is implied. The Supreme Court, as already shown, has interpreted this clause liberally, giving to Congress a large range of choice as to the means which it will employ in carrying its powers into effect. The "implied powers clause," moreover, extends not only to the enumerated powers of Congress but to whatever authority is granted by the constitution to any officer or department of the national government.

The  
powers of  
Congress  
in general.

These, then, are the powers of Congress as enumerated in the constitution. The simple words in which they are clothed give rather scant guidance to any proper conception of what these powers express and imply at the present day. "We may think that we have the constitution all before us," says Judge Cooley, "but for practical purposes the constitution is that which the govern-

<sup>1</sup> *Below*, pp. 430-431.

ment and the people recognize and respect as such." Everyone is the son of his own works. This is even more emphatically true of a constitution than of an individual. A strong constitution is one whose arms develop strength.

The lapse of time has shown that, if anything, the constitution gave Congress too few powers rather than too many. It might well have included the authority to make uniform rules concerning the chartering of corporations, the employment of child labor, marriage and divorce, and the rights of aliens in the several states. But its framers were human beings, without supernatural power to foresee conditions a century hence. On the whole they did marvelously well.

Are they  
broad  
enough?

## CHAPTER XXII

### LIMITATIONS ON THE POWERS OF CONGRESS

The idea that man has rights behind and beyond the written laws is peculiar to us. The doctrine that there are certain cardinal, or natural rights of man which no government ought to, and ours cannot, take away is peculiar to us of the United States. *Thomas M. Cooley.*

Constitutional limitations; their nature and importance.

In the preceding chapters the various powers of Congress, express and implied, have been surveyed. The constitution, however, does more than grant certain powers. It imposes limitations upon Congress in the exercise of its legislative authority, and these limitations are matters of supreme importance. Some of them relate only to the way in which a power may be exercised, as, for example, the provision that all federal taxes shall be uniform throughout the United States. But others are in the nature of general prohibitions; they forbid the exercise of certain powers under any circumstances. These restrictions and prohibitions are either expressly set forth in the constitution or may be reasonably implied from its provisions.

The chief limitations upon legislative power:

1. As to bills of attainder.

Congress is forbidden to pass any bill of attainder. A bill of attainder is a legislative measure which inflicts a penalty without a judicial trial. Legislation of this sort was frequent during the Tudor and Stuart periods of English history. By bills of attainder men in high office were "attainted" of treason and sent to the scaffold without even the forms of judicial process, their descendants even unto the third and fourth generation being deprived of civil rights. By a modified form of attainder known as bills of pains and penalties men were fined, or thrown into prison, or had their property confiscated. The enactment of attainders in any form is prohibited by the constitution because its makers believed that the courts, not the legislatures, ought to have the function of determining whether any citizen deserved the imposition of a penalty. So Congress and the state legislatures are alike forbidden to pass bills of attainder. After the



Civil War some of the border states tried to exclude from office all who refused to take an oath that they had not voluntarily borne arms against the Union; but the Supreme Court held this to be unconstitutional in that it imposed a penalty without judicial condemnation.<sup>1</sup> There are only two ways in which a legal penalty can be imposed upon anyone in the United States; one is by the verdict of some regular court of competent jurisdiction (including courts-martial); the other is by the process of impeachment.

The constitution also forbids also the passing of *ex post facto* laws. But not all laws which are retroactive in effect come within the scope of this prohibition. There is a popular idea that every law which reaches back to cover past events is an *ex post facto* law; but such is not the case. The limitation applies to criminal laws only, and even here it does not include any legislation but that which operates to the disadvantage of an accused person. In this matter one can tread upon firm ground, for the Supreme Court many years ago gave a full and exact definition of the *ex post facto* clause. It includes "every law that makes an action done before the passing of the law, and which was innocent when done, criminal and punishes such action; every law that aggravates a crime, or makes it greater than it was when committed; every law that changes the punishment and inflicts a greater punishment than the law annexed to a crime when committed; and every law that alters the legal rules of evidence and requires less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender."<sup>2</sup> In a word it includes any retroactive criminal law which operates to the disadvantage of an accused person.

Taking a lesson from English political history the makers of the constitution limited the power of Congress with respect to the definition and the punishment of treason. Treason is the oldest of crimes. In England it goes back to the time of the Saxon kings. Originally it was the offence of killing the monarch, but as time went on various other offences were included, such as levying war against him. During several centuries the category of treasonable offences steadily widened, all manner of "new-fangled treasons" being added to the list from reign to reign until the

2. As to *ex post facto* laws.

3. As to the definition and punishment of treason.

Early history of treason.

<sup>1</sup> *Cummings v. Missouri*, 44 Wallace, 277.

<sup>2</sup> *Calder v. Bull*, 3 Dallas, 386.

unrestricted power to make and alter the law of treason became a great weapon of abuse and oppression. To make sure that there should be no such extension in the United States the constitution restricts the crime of treason to a certain definite offence, namely, that of levying war against the United States, adhering to their enemies, giving them aid and comfort. It further provides that "no person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court," and, moreover, that no penalty for treason shall extend beyond the life of the person convicted. No punishment may be imposed upon the descendants of a traitor, or, as the words of the constitution express it, the penalties shall not "work corruption of blood or forfeiture, except during the life of the person attainted."

The  
American  
constitu-  
tional  
definition.

Treason  
against  
a state

Treason against the United States should be distinguished from treason against a state of the Union. The federal constitution makes no mention of the latter, hence each state may make its own definitions and provide its own degree of punishment. All of the states, either in their own constitutions or by statute, have exercised this right, but in the main they have followed the federal practice.

4. As to  
the depri-  
vation  
of life,  
liberty, or  
property  
without  
due process  
of law.

Among the provisions of the great charter which the barons of England wrung from King John in 1215 there was a stipulation that no freeman should be in any manner penalized save by "the lawful judgment of his peers or by the law of the land." This fundamental right of all freemen, after an existence of more than five hundred years in England, made its way into the constitution of the United States as a part of the fifth amendment, which provides that "no person shall be deprived of life, liberty or property without due process of law."<sup>1</sup> The meaning and scope of these four words "due process of law," however, have given the courts and the commentators a great deal of trouble, and even to-day their exact application is not absolutely clear. Few legal phrases in the whole history of jurisprudence, indeed, have proved so elusive. It has become a sort of palladium covering all manner of individual rights. The

<sup>1</sup> The phrase "due process of law" first appeared in a statute passed by parliament in the fourteenth century (28 Edw. III, 3). We have the word of the great English jurist, Sir Edward Coke, in his *Institutes*, that it was there used as the equivalent of the older phrase "law of the land."

highest American tribunal has refrained from committing itself to any hard and fast definition of the term, preferring rather that "its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise."<sup>1</sup>

But all students of American government know in a general way what the phrase means. Due process of law is a direct descendant of the expression *per legem terrae* which was used in Magna Carta.<sup>2</sup> It means that there must be, in all actions to deprive a man of his life, liberty or property, an observance of those judicial forms and usages which by general consent have become essentials of a fair judicial process.

The meaning of "due process."

Daniel Webster, in a famous argument before the Supreme Court, gave a definition of due process which will probably serve the layman as well as any other. It is the process of law, he asserted, "which hears before it condemns, which proceeds upon enquiry, and renders judgment only after trial. Its meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."<sup>3</sup>

Webster's definition.

Where the difficulty comes, however, is in the practical application of these "general rules which govern society." In the main the courts have held that due process of law requires a hearing of the issue by competent authorities before it is decided; but it does not necessitate that this hearing shall be by a jury or even by a judge. Questions involving a deprivation of property are sometimes determined by administrative officers, for example, the sale of lands for default in the payment of taxes. Due process does not require that an accused be given the right to appeal from the administrative officials to the courts, or from a lower court to a higher tribunal.<sup>4</sup>

The application of due process: (a) to judicial procedure.

Questions relating to due process of law have been frequently raised in connection with what is generally known as the right to "freedom of contract." The various state legislatures have

(b) to freedom of contract.

<sup>1</sup> *Twining v. New Jersey*, 211 U. S. 78.

<sup>2</sup> Nullus liber homo capiatur, vel imprisonetur, aut dissaisetur, aut autlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium suorum vel per legem terrae. *Magna Carta*, Art. 39.

<sup>3</sup> *The Dartmouth College Case*, 4 Wheaton 518.

<sup>4</sup> L. P. McGehee, *Due Process of Law under the Federal Constitution* (1906).

authority to pass laws for the protection of the public safety, health and morals. This authority is usually spoken of as "the police power" of the states. Naturally, in the exercise of this power, the state legislatures frequently interfere with the contractual freedom of individuals or corporations. Then arises the question whether there has been a deprivation of liberty or property without due process.

The Supreme Court has stood guard against frequent attempts to deprive individuals and corporations of their freedom of contract by the mere enactment of laws unless it can be shown that such laws are demanded by the public safety, health, or morality. Some years ago, for example, the legislature of New York State passed a law forbidding men to work in bakeries for more than sixty hours per week. The court held that this interference with the freedom of employers and employees in making contracts was not demanded by any considerations of safety, health, or morals, but was "an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to labor," and hence a deprivation without due process of law.<sup>1</sup> On the other hand the Supreme Court has held that state laws which limit the maximum hours of work for women and children in all industries, or for adult men in dangerous industries, are within the police power of the states. Its general attitude has been to uphold the constitutionality of a law whenever the law shows a clear purpose to safeguard the lives, health or morality of the people, but to deny constitutionality of any law which arbitrarily and without good reason interferes with the liberty or property of the citizen.

It will be noticed that the term "due process of law" appears twice in the constitution; in the fifth amendment as a limitation on the powers of Congress, and in the fourteenth amendment as a limitation upon the powers of the states. The Supreme Court has applied its censorship with an equal hand to both. But the states have been the chief offenders. State legislatures on many occasions have tried to play politics by passing laws which aimed to take away the property or the rights of one class for the benefit of another. It is well that the constitution prohibits this form of injustice. The safety, health and morals of the people ought to be safeguarded, even as against the right

<sup>1</sup> *Lockner v. New York* (1905), 198 U. S., 539.



of private property; but to take one man's freedom or property away from him, merely that other men shall profit thereby, is a policy that no well-governed country should ever tolerate.

Due process of law is not a stereotyped thing. A true philosophy of liberty must permit adaptation to new circumstances. It follows, therefore, that any legal proceeding which is in furtherance of the public good, and which preserves the principles of liberty and justice, must be held to be due process of law. To declare once and for all that certain formalities of procedure must in every case be observed where personal liberty or property are concerned would be to mummify all legal progress. The requirement as to due process was framed to afford protection against gross legislative unfairness; it was not intended to become a barrier to the reasonable regulation of property in the interests of social and industrial justice.

So with the constitutional provision that "private property shall not be taken for public use without just compensation." Before explaining this further limitation on the powers of Congress a word must be said about the right of eminent domain upon which the foregoing provision operates as a limitation. It is obvious that every government must have the right to acquire private property for public use even when the owner of the property objects to giving it up. Otherwise a government could not perform its functions, such property being needed from time to time for forts, navy yards, post-offices, customhouses, prisons, highways, and so on. The *domain* "or property-taking right" of the government must therefore be *eminent* or paramount, that is, it must be superior to the property-holding right of any individual. This is a well-recognized doctrine of both jurisprudence and political science, so well recognized, in fact, that it is never disputed nowadays. In the absence of constitutional limitations, therefore, the nation and the several states might each take private property without any payment at all. In England, parliament has that authority, although it does not practise the tyranny of taking property without paying for it. But in America the constitution contains express limitations upon the power of eminent domain. The national government is restricted by the terms of the fifth amendment, and the state governments are limited, for the most part in the same words, by the terms of their own constitutions.

Due process is not stationary.

5. As to the taking of private property.

The right of eminent domain. What it means.

The limitations upon the right of eminent domain :  
(a) as to public purpose.

The limitation is twofold: the taking of property must be for a public purpose, and just compensation must be given to the owner. But what is a public purpose? The courts have been liberal in their interpretation of this term. They have upheld the taking of land for post-offices and other buildings, for national forests, and for all other purposes related to the functions of government. Not only may the government itself exercise this right of taking private property for public purposes, moreover; it may confer the same right upon railroads or other corporations engaged in public or quasi-public enterprises. But the purpose of the taking must have some relation to the public interest. No government in the United States, whether national, state, or local, can take a man's property against his will and then turn it over to some other private individual for a clearly private use.

(b) as to just compensation.

The second limitation relates to the method of paying for private property whenever the government takes it. A private owner, when his property is taken for public use either by the government itself or by some corporation authorized by it, must always be awarded "just compensation." What is just compensation and how is it determined? As a rule the officers of the government or corporation make a valuation and offer the owner whatever amount they deem to be just. The owner, in most cases, demurs and refuses to accept this amount. Then, by the usual process of counter-offers and compromises, an agreement may be reached. If the private owner cannot get what he believes to be just compensation in this way he has an appeal to the courts, where a jury will decide what he must accept. This it does after hearing the testimony of various experts as to the value of the property.

6. As to judicial forms and procedure.

Many limitations with respect to the methods of judicial procedure are incorporated in the national constitution, especially in the first ten amendments. These limitations relate to jury trial, to certain rules of evidence, to the nature of punishments, and to second jeopardy for the same offence. They will be more appropriately explained in a later chapter dealing with the judicial power of the United States.<sup>1</sup> Let it be clearly explained at this point, however, that these limitations apply to the procedure of the federal courts only; they do not affect the procedure used in

<sup>1</sup> See *below*, ch. xxv.

the state courts. The latter are governed, as to procedure, by the terms of the state constitutions.

As there are implied powers in the constitution, so there are some implied limitations, in other words, some restrictions which are not set forth in definite terms but which follow from the general nature, form, and purposes of the federal government. The constitution, for example, does not expressly forbid Congress to delegate any of its lawmaking powers to the President, or to the heads of departments, or to the various administrative boards. Yet it is "one of the settled maxims in constitutional law," according to America's foremost authority on this subject, "that the power conferred upon Congress to make laws cannot be delegated by that department to any other body or officer. Where the sovereign power of the state has located that authority, there it must remain, and by that constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative [of lawmaking] has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."<sup>1</sup>

Because of this well-recognized limitation a nation-wide referendum as a means of accepting or rejecting a law would not be constitutional. Congress might, if it so chose, submit a question to the people as a means of securing an advisory test of public sentiment, and the Democratic national platform of 1924 proposes that the question of adhering to the League of Nations be so submitted; but the formal enactment of all federal statutes, as well as the conduct of foreign policy and the undivided responsibility therefor, must remain where the constitution placed it. Congress cannot delegate its legislative power and responsibility even to the whole people. To establish the principle of direct legislation by the people, so far as national lawmaking is concerned, would require the amendment of the constitution.

But while Congress may not delegate its lawmaking power it may delegate to some other body (or to some official) the function of determining when and how the provisions of the law are to be carried out. This latter is held to be a ministerial, not a

Implied limitations on the powers of Congress.

The rule as to delegation of legislative power.

Forbids resort to a nation-wide referendum.

Administrative discretion may be delegated.

<sup>1</sup> T. M. Cooley, *Constitutional Limitations* (7th ed., Boston, 1903), p. 163.

legislative function. It is permissible for Congress, to provide, for example, that a law shall go into effect whenever the President shall adjudge certain conditions to exist and shall so announce by proclamation.<sup>1</sup> It may even fix a minimum and a maximum schedule of tariff duties, leaving the President to determine (in accordance with certain specified conditions) whether the higher or lower rates shall be applied. But it must always retain the ultimate lawmaking power in its own hands. The same rule applies to the state legislatures. Discretion may be delegated, but not power.

Importance  
of this ad-  
ministra-  
tive dis-  
cretion.

This principle is of great importance because the conditions with which the laws have to deal are becoming endlessly complex. Laws are not by nature resilient or flexible. Hence the general provisions of a law, when unmodified by the exercise of official discretion, are sure to work some injustice. The best system of regulation is one which can be varied in strictness as the occasion demands. And such a system requires that a large amount of discretion, in the administration of the laws, shall be vested in some administrative board or officer. Hence it has become the policy of Congress to give powers of a comprehensive and diverse character to various federal boards, such as the interstate commerce commission, the federal reserve board, the federal trade commission, and even various administrative officials such as the postmaster-general or the commissioner-general of immigration. This action has been attacked in the courts as a delegation of legislative authority, but in practically every instance the action of Congress has been upheld.

One result of this new congressional policy has been to take the country a long way from its old legal traditions. It is easy to realize that, as official discretion widens, the government of the United States becomes more and more a government of men. We have seen during the past quarter of a century a steady growth of "administrative law," which is a rather incongruous term in a country that still professes the doctrine of separation of powers. So rapidly has this system of administrative discretion been extended that to-day a large part of the federal government's regulating authority is exercised by the issue of administrative decisions, rulings and orders. We have a general law relating to the federal income tax, for example,

<sup>1</sup> *Field v. Clark*, 143 U. S. 649.

It has  
introduced  
a new  
feature  
into  
American  
govern-  
ment.

Namely  
adminis-  
trative  
law.



but there are literally thousands of points which this law does not cover. Each one of these, when it arises, is covered by a ruling or order of the bureau of internal revenue. These rulings have become so numerous, indeed, and so complicated, that only an expert can thread his way through them. In a word, therefore, we are building up a great system of administrative law such as they have in the countries of Continental Europe.

This, however, is not at all to be deplored, even though it marks a departure from a good old shibboleth which is still dear to the hearts of politicians. Administrative regulation is far more equitable and far more effective than regulation by legislative fiat. The latter cannot bend without being broken. There is nothing dangerous about a government of men so long as it is a *government of men controlled by law*. That is what administrative regulation amounts to. Administrative officers, no matter how wide their discretion, can insert nothing, change nothing, repeal nothing. They possess only such latitude as the laws allow and even this can be withdrawn at any time.

But this  
is not  
a matter  
for regret.

The foregoing are not the only limitations upon the powers of Congress. Some others, more particularly those which relate to the rights of the citizen, have been already discussed under that heading; others, again, which concern judicial procedure will be explained in connection with the work of the federal courts. Constitutional limitations, a subject which concerns the student of European governments very little or not at all, can never be lightly brushed aside by any one who desires to understand the government of the United States. Perhaps we have limited the powers of Congress to a greater extent than there is need for. Certainly if we were re-framing the constitution tomorrow, some of these limitations would be left out. They were inserted in an age when legislative tyranny was greatly dreaded, and with good reason. Today a good deal of the danger has passed by. There is nowadays no likelihood that Congress would pass bills of attainder or take property without compensation or establish an American order of nobility—even if the limitations which relate to these things were stricken from the constitution altogether. Nevertheless they served a good purpose in their time and they are worth retaining.<sup>1</sup>

Importance  
of the  
whole  
subject.

<sup>1</sup>The standard work on the subject with which the foregoing chapter deals is T. M. Cooley's *Constitutional Limitations* (7th ed., Boston, 1903.)

## CHAPTER XXIII

### AMERICAN POLITICAL PARTIES: THEIR HISTORY AND FUNCTIONS

Like other institutions, the political party is in constant process of reconstruction, and must justify itself to each succeeding generation.—  
*Charles E. Merriam.*

Parties  
began with  
human  
nature.

All popular government is party government. There never has been, at any time in the world's history, a government "by the people but not by parties." The school textbooks tell us that American political parties began in 1787, but John Adams was more nearly correct when he averred that they began with human nature. There were political parties in ancient republics and in mediæval cities. There were Lancastrians and Yorkists, Cavaliers and Roundheads, Tories and Whigs, in England long before the American Revolution. There were Whigs and Tories in the thirteen colonies. These divisions were commonly called "factions" rather than parties, and their antagonism often assumed a violent form. But they were the ancestors of our present-day political parties. The chief difference is that the modern organizations have adapted their methods to an era of law and order.

Opposition  
of the  
Fathers  
to the  
party  
system.

The men who framed the constitution of the United States were not believers in party government. On the contrary they were at great pains to provide a scheme of government which would be free from party animosity or the "violence of faction" as James Madison expressed it.<sup>1</sup> This attitude of Madison and

<sup>1</sup> "Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. . . . By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . . . The latent causes of faction are sown in the nature of men; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government and other points . . . ; an attachment to different leaders . . . have in

his colleagues was quite in tune with the eighteenth century ideas of government which regarded all political divisions as pernicious. Before 1787 no English political writer of any consequence except Edmund Burke had dared to defend the party system, and his arguments were regarded as disingenuous attempts to gloss over the iniquities of cabals and cliques. The fathers of the American republic chose rather the gospel of Bolingbroke and Chatham, which frowned upon the "pestilential influence of party animosities."

It is strange that they should have done this; for they were men of great political sagacity and some of them were practical politicians of no mean caliber. But the eighteenth century gave men very little direct contact with the practice of free government. Governments everywhere, even the best of them, were strongly tinctured with despotism. Many intelligent men believed that factions were the result of misgovernment, that there need be no political parties in any rightly-governed country. In this they were wrong. Political parties grow and flourish even more luxuriantly in a democracy than in a despotism; they have always done so. Give any people the right to govern themselves, the right to think their own thoughts and to speak their minds aloud, and political parties are inevitable. The nineteenth century was to prove that parties will rise and grow under all forms of popular rule. But Washington, Madison, Hamilton and the rest did not, and could not, foresee that this would be the case. Accordingly, they framed a constitution with no mention of political parties in it. Even more, they did their best to safeguard the new Republic against the rise of parties. As well might they have tried to stem Niagara with a feather. Nothing that they did was so futile as this. Within a dozen years political parties had arisen in America and were fighting to control the Presidency. They have continued their fighting ever since. The stone which the builders rejected has become the chief stone of the corner.

For a very short time, due chiefly to Washington's personal influence, no regular political parties made their appearance in the United States. Washington's election was unanimous on

Yet parties are inevitable in all free governments.

Washington's antipathy to the "spirit of party."

turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good." *The Federalist*, No. 10.

both occasions, and he saw no reason why his successors should not be similarly chosen. But he also discerned indications that "the spirit of party" was rearing its sinister head and put his people on their guard against the danger. His farewell address was as much an admonition against party divisions within the Union as against permanent alliances outside. "In the most solemn manner" he warned the nation "against the baneful effects of the spirit of party generally," and declared that it had no place in an elective government.<sup>1</sup>

The beginnings of American political parties.

But it was useless for even the Father of his Country to inveigh against manifest destiny. Party divisions were bound to arise; indeed, they had already arisen. The members of the constitutional convention, as one can prove by the way in which they voted on the various questions, were virtually divided into two political parties. They did not realize it, of course, and would have resented the imputation; but to any one who reads their daily discussions there is no question about it. From the very outset of their deliberations the delegates divided themselves broadly into two groups on questions of general policy. There were those who believed in a real union, who wanted to subordinate the states to the nation, to bestow large powers upon the central government. These were the Federalists. On the other hand there were delegates, and they formed a minority, who desired that no power should go to the central government if it could be safely left to the several states. They believed that the central government should only care for the common defence and such other things as could not be handled by the states acting separately. These were the Anti-Federalists.

There were party groups even in the constitutional convention.

<sup>1</sup> "I have already intimated to you the danger of parties in the state, with particular reference to the founding of them on geographical discriminations. Let me now take a more comprehensive view, and warn you in the most solemn manner against the baleful effects of the spirit of party, generally. . . . It serves always to distract the public councils, and enfeebles the public administration. It agitates the community with ill-founded jealousies and false alarms, kindles the animosity of one part against another, foment occasional riot and insurrection. . . . There is an opinion that parties in free countries are useful checks upon the administration of the government, and serve to keep alive the spirit of liberty. This within certain limits is probably true—and in governments of a monarchical cast, patriotism may look with indulgence, if not with favour, upon the spirit of party. But in those of the popular character, in governments purely elective, it is a spirit not to be encouraged. . . . A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into a flame, lest, instead of warming, it should consume." "Farewell Address" (*Writings of Washington*, edited by L. B. Evans, N. Y., 1908), p. 539.



So American political parties were already well-defined as early as 1787 when Edmund Randolph and William Paterson marshalled the delegates into two groups on the first great question that came before the constitutional convention. They crystallized into permanent form when Alexander Hamilton lined up one half the country against Thomas Jefferson and the other half, during Washington's first administration. The breach widened during the next ten years, and by 1800 the country had a party system which, in all its essentials, was exactly like that which we have to-day.

During the first ten years after the constitution was put into force the Federalists held the upper hand. This was largely because the reaction against the weaknesses of the old Confederation ran strongly in the minds of the people and they were willing to have the central government gain in strength. The excesses of the French Revolution (1789-1802) likewise disgusted public opinion in America and led it to place more emphasis on order and authority than upon the natural liberty of states or individuals. Washington was not a party man. He was elected by no political party and showed his sincerity as a non-partisan by choosing his cabinet from both political groups. Hamilton and Jefferson, despite their opposing political views, were both members of his first official family. But while Washington was neither by temperament nor by training a partisan he gravitated steadily towards the Federalist point of view. During the eight years of his administration the first United States Bank was established; the first tariff on imports was framed; the national credit was put upon a firm basis and a system of taxation created. Provision, likewise, was made for taking over and paying off the debts incurred by the various states in the Revolution. In all these things the handiwork of Hamilton, the Federalist leader, was made manifest.

This rapid centralization of functions, however, aroused strong opposition, particularly among that part of the population which had no important financial or commercial interests at stake. To the farmers and frontiersmen, the Federalist policy looked like a surrender to the moneyed and shipping interests. Jefferson, whose antagonism to the Federalist attitude was not concealed even while he was a member of the cabinet, came to be recognized as the champion of the opposition, and his followers were

The  
Federalists  
and  
Anti-Federalists.

The  
Federalists  
in the  
saddle,  
1789-1800.

called Democratic-Republicans, or, in time, simply Democrats.<sup>1</sup> Their strength among the people soon increased, and at the election of 1796 they almost defeated John Adams, the Federalist candidate for the presidency.

Their  
disunion  
under  
Adams.

The administration of John Adams gave Jefferson and his followers a chance to make great headway. Hamilton, the most brilliant spirit in the ranks of the Federalists, could not work in harmony with Adams. The two were altogether unlike in temperament and ways, and their relations ended in an open breach. This greatly weakened the party. By their support of the Alien and Sedition Acts (1798), moreover, the Federalists made a serious error, giving Jefferson and his friends a fine opportunity to make political capital. The country rang with their cry that these measures were designed to bolster the falling fortunes of the Federalist party by repressing freedom of speech and stifling criticism. Every prosecution under these laws provided the occasion for popular demonstrations against the Federalists. The result was that at the election of 1800 Jefferson was triumphantly returned and the Democratic-Republicans assumed control of the national government. Before the close of his administration, however, Adams succeeded in clinching for many years the hold of the Federalists upon one department of the government, namely, the Supreme Court. This he did by appointing John Marshall to be chief justice.

The Jeffersonian  
victory of  
1800.

The election of 1800 disclosed a clean-cut political alignment not only among the leaders but among the people. The agricultural population of the country,—the small farmers of the north, and the planters of the south,—supported Jefferson. The industrial and the trading interests were with Adams. The change from Adams to Jefferson was, therefore, a turnover of great political significance. The Federalists had been conservative, aristocratic, even reactionary. They had clung with great tenacity to theories of government which placed more emphasis upon order than upon liberty. They strove to make the central government a real power in the land, construing in a broad way the powers granted to Congress by the constitution. Jefferson and

<sup>1</sup> Frequently they were called "Republicans." To use this term in speaking of them is not now essential, however, and is very confusing. Nothing could sound much stranger to the ear of the average American than to hear Thomas Jefferson spoken of as the founder of the "Republican" party.

his Democratic-Republican followers, on the other hand, professed those theories of government which laid stress upon the natural liberty of the citizen. They asserted that the provisions of the constitution which gave powers to the federal government should be strictly construed. They were partisans of state rights and gave their allegiance to what they liked to call "democratic principles." Yet they did not, after their accession to power, throw overboard what the Federalists had acquired for the new government. They continued the protective tariff, established another United States bank, and in the purchase of the Louisiana Territory gave the broadest possible interpretation to the powers of the national government. The Alien and Sedition laws were allowed to lapse; but the Embargo Act which shut off American commerce with Europe (1807), and the methods used in its enforcement, constituted quite as great an interference with individual liberty.

Supremacy  
of the  
Demo-  
cratic-Re-  
publicans.  
1800-1824.

Nevertheless, Jefferson remained strong in the confidence of the people, as his reelection proved in 1804, and he was able to pass on the presidency to his disciple, Madison, at the close of his second term in 1809. During the two administrations of Madison the Federalist party still further disintegrated, and at the election of 1820 placed no candidate before the people. With the election of James Monroe in 1820 the Democratic-Republicans were in complete control, their candidate having carried every state in the Union.<sup>1</sup> The Federalist party went out of existence.

Disintegra-  
tion of  
the Fed-  
eralists.

With the disappearance of the Federalist party there began an "era of good feeling," as the textbooks of American history call it. Some people were foolish enough to believe that political divisions had been abolished by the simple expedient of one party swallowing the other, and that the nation would stay unified in its political beliefs. But no party can ever remain permanently in control of a free government. A majority party, no matter how strong, has within itself the germs of decay. The more pro-

The party  
chaos of  
1824.

<sup>1</sup> One elector from New Hampshire gave his vote for John Quincy Adams for President, and thus deprived Monroe of the honor of a unanimous election. It has been frequently said that this recalcitrant elector did so in order to prevent any one else from sharing with Washington the honor of a unanimous choice; but this statement is not true. The elector had other reasons for his action. See Edward Stanwood, *A History of the Presidency* (2d ed., 2 vols., Boston, 1916), i, p. 118.

nounced its ascendancy, in fact, the more quickly it is likely to disintegrate. Signs of disunion showed themselves among the Democratic-Republicans, even before the celebration of their unparalleled victory was over. The leaders could not act together; so they gravitated apart, each carrying a section of the party after him. Clay, Calhoun, Crawford, Jackson, DeWitt Clinton and John Quincy Adams all had their enthusiastic followers. Party politics, for a time, gave way to personal politics, which assuredly was no improvement. It was for this reason that the people failed to give any presidential candidate a majority in 1824 and thus compelled the House to make the choice. Nobody relished this new scheme of factional politics and after a brief interval the various elements once again became united into two parties—one of them calling itself National Republicans (later Whigs) and the other Democrats. The former supported John Quincy Adams for reëlection to the presidency in 1828, while the latter chose Andrew Jackson as its standard-bearer. Jackson won.

The  
election of  
Jackson  
and the  
era  
of Demo-  
cratic  
supremacy,  
1824-1844.

"The election of General Jackson to the presidency," says Professor Channing, "was the most important event in the history of the United States between the election of Jefferson in 1800 and that of Lincoln sixty years later. Madison, Monroe, and John Quincy Adams belonged to the Jeffersonian school of statesmen who, while holding liberal views, yet represented in their education and habits of thought the older and more courtly type of which Washington was the most conspicuous example. Jackson, on the other hand, was an indigenous product of the American soil. Vigorous and absolutely without fear, he was a born leader of men. The Jeffersonian theory aimed rather at the establishment of state democracies, while Jackson's mission was the founding of a national democracy."<sup>1</sup>

The election of Jackson, at any rate, is a great landmark in the history of American political parties. His views and policies were forceful; they made him warm friends and bitter enemies; they accentuated the division of the people into two great parties, Whigs and Democrats.<sup>2</sup> Jackson's extension of the spoils system promoted the efficiency of party organization by

<sup>1</sup> *The United States, 1765-1865* (New York, 1896), p. 208.

<sup>2</sup> The Whig party was organized in 1834 by a combination of the National Republicans with one faction of former Democrats.



giving his party something tangible to fight for. But even more important was his successful fight to break up the congressional caucus as a machine for nominating presidential candidates, thus paving the way for the rise of the national party conventions.

The Democrats continued to hold power until 1841, having re-elected Jackson in 1832 and named Van Buren as his successor in 1836. Then commenced an era of party alternation in office. The issue of slavery came more and more to dominate the political arena, and in the end it split both the Whig and Democratic parties asunder. During the middle fifties a new Republican party arose from the ruins of the old Whig organization and clinched its position by securing the election of Lincoln over a divided opposition in 1860. This election ushered in a period of Republican supremacy which continued for twenty-four years, from 1861 to 1885.

The alternations and reorganizations of the period 1844-1860.

The Civil War, while it lasted, drew into the Republican ranks all those who believed in "the unconditional maintenance of the Union, the supremacy of the constitution, and the complete suppression of the existing rebellion with the cause thereof by all apt and efficient means." It was by appealing to the voters on this program that the Republicans re-elected Lincoln in 1864. When the war ended it left the Republican party strongly entrenched. Then came the difficult task of reconstruction which kept sectional bitterness alive, and it was not until the end of Grant's second term (1877) that the two great parties began to align themselves upon issues wholly unconnected with the Civil War.

The effect of the Civil War on party strength.

One of the legacies of the war was a high tariff, and the continuance of a protective policy during the seventies drew to the Republicans the support of the large business interests of the country. Questions of finance and currency also came to the front during this period and they were dealt with by the Republicans in a way which drew support from those who believed in conservative financial legislation. The Democrats, on the other hand, made their appeal to the friends of tariff reduction, to the agricultural voters of the south, to those who had radical views on matters of finance and currency. Grant, Hayes, and Garfield successively carried the Republican standard to victory during these years when questions relating to the tariff and the currency were the great issues. It was not until the election of

Alliance of the Republicans with the business interests.

The  
election  
of 1884.

1884 that the Republican hold upon the presidency was relaxed, and the triumph of Grover Cleveland in that year was directly due to the action of malcontents or Mugwumps within the Republican ranks.

Recent  
party de-  
velopments.

At each of the next four elections the tariff continued to be a prime issue, although the Democratic adoption of a free-silver program in 1896 thrust the question of bimetallism into the foreground. The Democrats did not find this issue a winning one, and they dropped it from their platform. Until 1912, therefore, the cleavage between the two major parties remained tolerably clear, and it related more directly to the tariff than to any other issue. In 1912, however, there came a schism in the Republican ranks, a revolt against the alleged reactionary methods and tendencies of its leaders, with the resulting formation of the short-lived Progressive party. This division in the Republican ranks made certain the success of the Democrats in the election of that year. By 1916 this breach had been to a large extent healed, but the issues between the Democrats and the reunited Republicans were no longer so clearly marked out as in the years before the Progressive insurrection. The tariff dropped out of public discussion and there were no currency questions in dispute. The relation of the United States to the great war which for two years had been raging in Europe was the chief worry in the minds of the people.

The  
League of  
Nations  
issue.

The great war came to an end in 1918 and a treaty of peace was signed. Along with the treaty, President Wilson brought home the Covenant of the League of Nations and both were submitted to the Senate for ratification. The Democratic party, through the President's action, found itself committed to the League; while the Republicans opposed America's adhesion to it. The treaty and covenant failed in the Senate and the whole issue went to the people at the presidential election of 1920.

Summary  
of party  
history :  
First  
period :  
1787-1820.

The entire history of political parties in the United States, covering a stretch of one hundred and thirty-eight years, may be marked off, by way of summary, into three periods. The first extends from 1787 to 1820, an era in which the Federalists and the Democratic-Republicans, the exponents of national centralization and of state rights, arrayed the people into two well-defined political groups. Until 1800 the Federalists maintained their hold; then with the election of Jefferson their opponents

began their march to supremacy and ultimately annihilated the Federalists altogether.

The second period extends from about 1820 to 1861. It was marked by a succession of party crumbings and new integrations. First came the break-up of the old Democratic-Republican organization into groups of which some eventually united to form the Democratic party under the leadership of Andrew Jackson, while the others consolidated into the Whig party under the leadership of Adams, Webster, and Clay. Then, in due course, ensued the disruption of the Whigs in the campaign of 1856 and the rise of the new Republican party, which went into office in 1861 and stayed there without interruption for twenty-four years.

Second  
period:  
1820-1860.

The third period covers the years since the Civil War. During that time the line-up of Republicans and Democrats, save for temporary defections, has been pretty well preserved. These two great parties, since 1861, have had a longer and more intelligible history than any of their predecessors. It is during this period, moreover, that in addition to the regular political parties, various other organizations with political, social, or economic programs have come into the field and have managed to continue their existence over considerable periods of time.

Third  
period:  
1860-

Three of these minor parties deserve mention even in the briefest outline of party history. One of them is the Prohibition party, which held its first national convention in 1872. Its fundamental principle, as its name implies, is opposition to the manufacture and sale of intoxicating liquors, but in recent years the party platform has expressed itself on various other issues as well. The Prohibition party has regularly nominated its candidates for President and Vice-President, and although these candidates have at times obtained a considerable vote at the polls (more than a quarter of a million on one occasion), the party never secured a single vote in the electoral college. Until 1920 its main purpose was to secure the enactment of prohibition; since that time its energies have been devoted to the equally difficult task of compelling the enforcement of prohibition.

Minor  
parties:  
the Pro-  
hibition  
party.

The Socialist party in the United States began its career as a national party about twenty-five years ago, but for some time previous there had been a Socialist-Labor and a Social-Democratic party. The Socialist party of to-day is the result of a

The  
Socialist  
party.

Its  
platform.

union of these two earlier organizations.<sup>1</sup> Its platform calls for both economic and political reforms. Among the economic demands are the public ownership of railroads, telegraphs and telephones, the extension of state ownership to mines, forests, and other natural resources, the socialization of industry, the provision of work for the unemployed, and the establishment of pensions for the aged. Among political reforms the Socialist party demands the initiative and referendum on a nation-wide scale, the abolition of the United States Senate, the popular election of federal judges for short terms, and the abolition of the Supreme Court's power to declare laws unconstitutional. At the presidential election of 1920 the Socialist candidate, Eugene V. Debs, was supported by nearly a million voters, but did not obtain a single vote in the electoral college. In Congress the Socialist party has never had more than a single representative at any time, which is in striking contrast with the situation in European legislative bodies.

Other  
minor  
parties.

Other minor parties have arisen periodically in American politics, and they will doubtless continue to arise in the future. Some times they develop great strength within a few years, but almost as quickly lose it again. The history of the Populists (1890-1896), and the Progressives (1912-1916), affords good illustrations. Englishmen often ask, and Americans find it hard to explain, why there is no strong Labor party in the United States. The formation of such a party has frequently been urged at meetings of the American Federation of Labor but has never received the endorsement of this organization. The Federation has preferred to gain its ends by putting pressure upon the two major political parties, or by pooling its strength with a third party, as it did in 1924. Some years ago an Independent Labor party was formed by the more radical labor element and in the presidential campaign of 1920 it was merged with various other malcontents into the Farmer-Labor party. But the alliance made a sorry showing at the presidential election of that year.

The  
LaFollette  
alliance.

In the campaign of 1924 a number of organizations, outside the ranks of the two major parties, allied themselves as Independents in supporting the candidacy of Mr. LaFollette. Great

<sup>1</sup> Not all the members of the Socialist-Labor party went into this union. So it continues in existence and regularly puts candidates in the field, but they poll a very small vote.



pains were taken to assure the country that this was not the creation of a third "party" in the ordinary sense, but the combination of groups quickly developed all the earmarks of a political party, including a platform, a candidate, a national committee, and a campaign fund. Although Mr. LaFollette carried only one state (Wisconsin), his followers developed greater strength in the country than any third party had been able to do since 1912.

It is sometimes said that the genius of a nation for self-government can be best judged by a study of its political parties. The strength of parties is an index of popular interest in public affairs; their weakness and disintegration is a sign of a political indifference among the people. What, after all, is a political party? Edmund Burke defined a political party as "a body of men united for the purpose of promoting by their joint endeavors the national interest upon some particular principle on which they are all agreed." That is, at any rate, a good definition of what a political party ought to be.

Definition  
of a  
political  
party.

Political parties, in short, are groups made up of voters who profess to think alike on public questions. Their aim is to promote the success of those policies and methods in which they believe. They are a perfectly natural outcome of the fact that all people do not think alike nor yet do they all think differently. Left to themselves they will think in groups, and they will act in groups. It is a self-evident truth in politics (as in everything else) that men and women can accomplish more by acting in co-operation than by acting individually. So, when people believe in any social, political or economic doctrine they arrange to flock together. This consciousness of kind is universal.

The  
psychology  
of parties.

If all people thought alike on political questions there would be no political parties; if every man thought differently from his fellows there would also be no parties, for every voter would then be a political party unto himself. So the political party is a psychological manifestation in all forms of government, except a despotism on the one hand or an anarchy on the other. In witness whereof one need only repeat that no country has ever been able to maintain, over considerable periods of time, any form of responsible government without the aid of political parties. And it is safe to prophesy that no country ever will.

Yet essential as political parties are to the proper workings of government in all democratic countries, they have been com-

But they  
have not  
been so  
recognized.

pelled to grow up without much nursing from constitutions or laws. The laws have either ignored the existence of political parties altogether or have sought to hold them in check by regulatory provisions. Parties, whether in England, France, or America, are extra-constitutional institutions, not formally recognized as having any influence upon the actions of the government. Neither parliament nor Congress has ever admitted that an outside political organization is entitled to delineate its policies or determine the obligations of its members. Yet no one who observes the actual workings of either body can fail to note the dominating influence exerted by party platforms, party discipline, and party allegiance in both of them. The constitution of the United States may ignore the existence of political parties, but the student of American government cannot. He must realize that the nation is governed by two sets of political institutions. One of them is regularly organized by the constitution and the laws; we call it "the national government." The other, although it is wholly ignored by the constitution and largely ignored by the laws, we call "the party system." The two have become inseparably linked together, they interlock at every point and make it impossible to understand the one without a knowledge of the other.

The  
party  
system  
con-  
tributes  
greatly  
to the  
complica-  
tions of  
govern-  
ment.

It is for this reason, also, that government is such a complicated affair. There is a visible mechanism which functions in plain view. But behind it, providing it with momentum, keeping it lubricated, with a hand on the throttle, stands a great array of powerful forces which are only half-visible. These forces, and they are of unending complexity, the party system generates. When people find the study of government a simple affair (as some of them say they do) it is because they leave out of account everything that does not have a high degree of visibility. They see only the husk and miss the kernel. They look at Congress in session and imagine that they see the whole process of law-making. They note that the President has sent some names to the Senate for confirmation and assume that they understand the whole process of appointment. It is like looking at the outside of an elephant and imagining that you know all about the biology of a pachyderm. The superficial anatomy of a government is easy to master, its physiology is not. Political parties have made it so.

Now how does a political party figure in the vitals of a government? What are its organic functions? In general a party has four functions. In the first place it singles out and frames political issues for presentation to the public. The intangible things that we call "political issues" do not come into the world ready-made. An idea is transformed into a proposal; it becomes a plank in a platform, and finally an issue. The party system brings it through these various stages. By means of their programs and platforms the parties give the electorate a choice among alternatives.<sup>1</sup> "We believe in the adoption of a non-contributory old-age pension system," may be a plank in the platform of one party. "We view with alarm the proposal to spend large sums of public money in old-age pensions except upon a contributory basis," the platform of the other party may make reply. Party assertions of this type put questions of public policy squarely before the voter. Indeed, it may well be said that in order to get a good idea transformed into legislation the first step is to have it enunciated in one or both of the party platforms.

The organic functions of a political party:  
1. To select public issues and present them to the electorate.

An election under the party system is not merely a means of choosing candidates but a referendum on great issues. The specific political views of men range over a wide area; but in a democracy they must be willing to make sacrifices of individual opinion to reach common ground. It is the function of party organizations to find that common ground which will attract the greatest number of individual preferences among the voters. Or to express it in another way: the function of preparing a political creed upon which large numbers of men can substantially agree, a creed made up by selecting those aspirations which are uppermost in the minds of the people and embodying them in a platform—that is the first function of a political party. It is a function that absolutely must be performed in every well-governed country, yet it is difficult to see how, in the absence of political parties, it would be performed at all.

Importance of this function.

It is quite true, of course, that political parties do not always display honesty and frankness in this work of delineating the issues. Sometimes their platforms present questions to the people in a bewildering or evasive form. Sometimes, again, they

Although it is not always well performed.

<sup>1</sup> See the chapter entitled "The Choice among Alternatives" in President Lowell's *Public Opinion in War and Peace* (Cambridge, 1923), pp. 127-171.

dress up the party's principles in resounding platitudes which may mean anything or nothing at all. At times they simply evade important issues or straddle them, as in 1892, when neither of the great American parties dared to take an unambiguous stand on the free silver question. Nevertheless, the main issues at each election are made fairly clear, and certainly they are much less obscure than if there were no party platforms at all.

2. To  
select  
the can-  
didates.

Second, it is the political parties that seek out and nominate the candidates for public office. It is an old platitude that "the office should seek the man, not the man the office." Perhaps it should, but it never does. It is the men, not the offices, that do the seeking, and they do it in such large numbers that a preliminary sifting is necessary, otherwise the machinery of election would break down. And it is the political parties that perform this function of winnowing a hundred candidates down to two or three. They provide and maintain a large part of the selective mechanism.

3. To  
establish  
a collec-  
tive and  
contin-  
uing  
political  
responsi-  
bility.

In the third place, it is the function of political parties to provide a system of collective and continuing responsibility. Responsibility, to be real, must be both collective and continuing. The mere fact that every officeholder is responsible to the people does not guarantee a responsible government. They must be collectively responsible, and to this end there must be some group or organization which recommends them and takes the responsibility for what they do. As a penalty for inefficiency and a deterrent to any repetition of it, the mere turning of an officer out of his post when his term has expired avails but little. The penalty, to be effective, must also fall on his bondsmen, that is, upon the political party which by nominating him vouched for his fitness.

The party thus serves as a guarantor, pledging its own interests and reputation, at times staking even its existence upon the ability and integrity of the men whom it places in nomination for public office. If its candidates are elected and make good, the party gets the credit; if they are elected and fail, the party cannot evade the responsibility. Party leaders are well aware of this, and that is why they hardly ever fail to remind the people of the great men whom the party has put into office from time to time. It is a rare Republican platform which does not seek to drag in the names of Lincoln and Roosevelt, while the



Democrats usually find some excuse for harking back to Thomas Jefferson. A great and striking President becomes a regular and permanent asset to the party which nominated him; a weak or inefficient chief executive becomes a serious liability. In a word the party system makes for organic as well as personal responsibility, establishing an accountability which is real, continuing, and effective. Without parties the responsibility would go no farther than the office holder himself, and it would end with the expiry of his term.

Finally, the political parties assist the practical workings of popular government. Popular apathy is the great menace to free institutions. The awakening of the voter's interest and the promotion of political discussion are essential in any democracy which seeks to be worthy of its name. If every voter were left to inform himself on political questions and to vote without either guidance or leadership, no democratic scheme of government would survive.

4. To serve as agencies of civic education.

Now the political parties render great services in the field of political education. They stimulate discussion, fill the newspapers with their controversies, attract the attention of the people by their rallies, parades, and demonstrations, deluge the voter with their circulars and harry him to the polls on election day. "If all men took a keen interest in public affairs, studied them laboriously, and met constantly in a popular assembly where they were debated and decided, there would be no need of other agencies to draw attention to political questions. But in a modern industrial democracy, where the bulk of the voters are more absorbed in earning their bread than in affairs of state, these conditions are not fulfilled, and in case no one made it his business to expound public questions or advocate a definite solution of them they would commonly go by default."<sup>1</sup> It is true, of course, that a great deal of the literature which is put out from party headquarters during an election campaign does not possess any educative value. It is pure propaganda, and sometimes crude propaganda at that. The same is true of the speech-making. To that extent the political parties render a negative service in dispelling ignorance from the minds of the people. Yet when all is said and done, the party organizations do stir the peo-

<sup>1</sup> A. L. Lowell, *Public Opinion and Popular Government* (N. Y., 1913), p. 61.

ple and compel them to think about public affairs. Indeed, the complaint is sometimes made that they stir things too much and make the election campaign a serious interference with the normal course of business.

These four functions,—formulating issues, nominating candidates, maintaining a collective and continuing responsibility, and stirring up the people—they would not be performed if party organizations did not take them in hand. They would become everybody's business, that is, nobody's business. The critics of the party system direct their fire against abuses which have developed in the performance of these functions.<sup>1</sup> They keep reiterating that political parties do their work badly and under corrupt leadership, all of which is sometimes quite true. But the question is not whether parties are good or evil; the question is whether they are inevitable. And if they are inevitable, as the whole range of political history seems to indicate, the only practicable course is to retain them, improve them, reform them, and eliminate their abuses so far as we can.

To perform their functions satisfactorily it is essential that parties be given a fair chance. We should not complain because they build up a lot of machinery, for a complex task cannot be performed with simple agencies. Candidates must be brought forward, hence the need for caucuses or conventions or primaries. Candidates, moreover, cannot be elected without effort, and a good campaign requires funds, workers, and discipline. Hence the need for party committees and officials, for party contributions, and for the whole complicated mechanism of party organization. The American party machine is not a chance development. Neither is it the product of human perverseness. It is not even the outcome of political indifference on the part of a people so engrossed in their private vocations as to surrender the conduct of public business into professional hands. It is merely the result of a desire to do in an efficient way the things that have to be done.

When reformers, therefore, plead for the abolition of parties they display unfamiliarity with both the history and the prin-

<sup>1</sup> The reader who would like to see a trenchant criticism of the way in which modern political parties perform their functions will find it in R. Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy* (New York, 1915).

Summary  
of func-  
tions.

Need of  
machinery  
to carry  
out these  
functions.

Indepen-  
dence of  
party is  
not  
necessarily  
a virtue.

ciples of democratic government. President Lowell quotes "a prominent reformer" who urged that it was the duty of every good citizen to go to the polls and to vote for the man he thought most fit for an office, whether other people proposed to vote for him or not.<sup>1</sup> And he adds, quite rightly, that a more certain way of insuring the victory of undesirable candidates could hardly be devised. One might as well say that every good soldier should fight as his own conscience directs, and not as the interest of the whole army demands. An army that fought on any such basis would be sure to lose, but no surer than a body of voters following the same principles of discipline. In matters affecting individual conduct every citizen may well let his own conscience tell him what to do; but the election of competent officials, the putting of good laws on the statute books, and the inauguration of reforms in government are matters that require unity of effort and the submerging of personal preferences for the sake of the cause as a whole. It is the function of the party to provide the channel for this concerted action, hence the staunchest party man may really be the most effective reformer.

It is one way of insuring bad government.

It will now become more readily apparent, perhaps, why third parties come into existence only when the regular party system is not working smoothly. The most satisfactory working of representative government is secured under a two-party system, one party unitedly supporting the administration, the other presenting a vigorous opposition. When its support is divided, an administration cannot be sure of its ground; it must compromise; its policy will not be firm and decisive. If, on the other hand, the opposition is divided, the administration will not be subjected to that unrelenting pressure which is necessary to keep it on its mettle, endeavoring to do its best. Where there are three, four, or five parties there is no real separation of the political issues and the elections decide nothing permanently. In France, Germany and in Italy, where there are several political parties, the effect has been to hinder the continuity of public policy, to weaken the administration, and to becloud the issues which go before the people. It has made necessary the forming of "blocs" or coalitions (inasmuch as no one party is able to secure a majority) and these blocs have no real cohesion. They are continually falling apart and being re-formed in some new way.

Advantages of the two-party system.

<sup>1</sup> *Public Opinion and Popular Government* (N. Y., 1913), p. 67.

Let any intelligent American study the political history of France during the past half century and decide whether he would like to see a disintegrated party system in the United States. Let him go farther and find the country which has the largest number of political parties; he will come pretty near to putting his finger on the worst government in Christendom.

No room  
for third  
parties  
in a  
smooth-  
working  
democracy.

Two  
parties  
can cover  
the issues.

When political parties function as they ought to function there is no room for a third party or a fourth party, much less for the twenty-nine parties which manage to exist in the republic of Portugal. Things which the voters desire will be seized upon by one of the two regular parties and incorporated into its own program long before they can be used as the endowment of a new party. If the two regular parties do not use unceasing vigilance in this direction, and if they are not always on the lookout for new and popular issues, they fail to fulfil one of their chief functions. There should be no issues left for a third party to pick up but those which are either unpopular or impractical. All political issues, by the way, may be grouped into three classes: those which are popular but not practicable; those which are practicable but not popular; and those which are both popular and practicable. The regular parties, if they are alert, capture all of the last; no party wants the second; and the third party must content itself with the first.<sup>1</sup>

<sup>1</sup> Much has been written on the history, structure and functions of political parties in the United States. The most elaborate work is M. Ostrogorski's *Democracy and the Organization of Political Parties* (new edition, New York, 2 vols., 1922). There are some excellent discussions in Henry J. Ford's *Rise and Growth of American Politics* (New York, 1898) and in Lord Bryce's *Modern Democracies* (2 vols., New York, 1921). Other useful books on the subject are J. A. Woodburn's *Political Parties and Party Problems* (New York, 1914), Jesse Macy's *Party Organization and Machinery* (New York, 1904), A. Lawrence Lowell's *Public Opinion and Popular Government* (New York, 1912) and his later volume on *Public Opinion in War and Peace* (Cambridge, 1923), Charles E. Merriam's *American Party System* (New York, 1922), P. O. Ray's *Political Parties and Practical Politics* (new edition, New York, 1925), R. C. Brooks, *Political Parties and Electoral Problems* (New York, 1923), E. E. Robinson's *Evolution of American Political Parties* (New York, 1924), and A. N. Holcombe's *Political Parties of Today* (New York, 1924). See also the note at the end of Chapter xxiv.



## CHAPTER XXIV

### POLITICAL PARTIES IN NATIONAL GOVERNMENT: THEIR ORGANIZATION AND METHODS

Looking at government from a practical and businesslike point of view, it seems to be unquestionably and in a high degree desirable that all legislation should distinctly represent the action of parties as parties.—*Woodrow Wilson*.

Every political party has two aims, one immediate and the other ultimate. The immediate aim is to win an election and get control of the government; the ultimate aim is to carry out a policy by means of this control. To achieve its immediate aim the party must have an organization, for elections can only be won by united effort. So American parties maintain nationwide organizations. These organizations have developed from rudimentary beginnings, but they are now the most elaborate and efficient institutions of their type in any country.

During colonial days there existed in various parts of the country, but especially in the New England towns, various clubs or cliques which were at first social in character, but which became hotbeds of political discussion during the stormy days of stamp taxes and tea parties. The best known among them was the Caucus Club of Boston; in selecting its name it coined a word which is now used through the English-speaking world. These local clubs played a considerable part in colonial politics. After the Revolution similar clubs or "Democratic Societies" were formed in the cities and towns of the various states, but public opinion did not take kindly to these self-created organizations and they eventually went out of existence.

But some form of organization was necessary and in order to make the nominations for public office, especially after 1800 when party activities began to grow intense. And there being no other machinery available the function of making these nominations was usurped by the party representatives in Congress and in the

The  
need for  
organiza-  
tion.

Earliest  
forms of  
party  
organiza-  
tion.

The  
legislative  
caucus.

state legislatures. The legislative caucus became the backbone of the party organization. In 1800 both the Federalist and the Democratic-Republican members of Congress held their conclaves and nominated their respective candidates for the presidency. The same practice spread to the states. Candidates for governor and for the other high state offices were nominated by legislative caucuses. No one invented this plan of making nominations and organizing the campaign; it was seized upon by both parties because it was the easiest way. The legislators were party-men; they represented all sections; they were already assembled; it was much easier to have them do the work than to call special conventions.

Replaced  
by the  
convention.

But these legislative caucuses were not favorably regarded by the people at large; they were regarded as having usurped a function which belonged to the voters and not to legislators. They were virtually electing presidents and governors, it was asserted. They were denying the people that freedom of choice which the constitutions and laws intended to bestow. So antagonism grew stronger as time went on and by 1824 it became powerful enough to wipe the legislative caucus off the political map. But what was to take their place? The answer to this question was quickly provided by the rise of the party *convention*. Conventions of delegates had already been making nominations in some of the counties and congressional districts. In some of the states, moreover, the legislative caucus had been adding outside delegates to its own membership, thus transforming itself into a convention. At any rate the plan of calling regular conventions of delegates came gradually into general use and by 1836 it had been everywhere adopted. District or county conventions, state conventions, national conventions were making the party nominations in all fields of government.

The  
gradual  
elabora-  
tion of  
internal  
machin-  
ery.

Conventions could nominate candidates, and they could frame party platforms, but they could not manage the campaign. To do this it was necessary to have committees. So committees were named by the conventions to canvass the voters, raise funds, get out election literature, and print ballots—for in those days the ballots were provided by the party organizations. Then, as the country grew in population and more voters had to be reached, the committees found more work to do. It became necessary to have sub-committees, to maintain a corps of paid workers during

the campaign, and to raise much larger sums of money to pay for all this. Little by little, in this way, the party organization became more extensive and more complicated. Every change added to the mechanism and introduced new complexities. The introduction of the direct primary in many of the states altered the method of making the nominations and of choosing the delegates to the party conventions; but it did not simplify the mechanism of party organization. Quite the contrary. So we have evolved, by gradual and natural process, that marvelous network of conventions, committees, chairmen, leaders, bosses, and other party functionaries which cover the land from sea to sea. They form a larger army of professional politicians than can be found in all the rest of the world put together. Their activity is ceaseless—raising money and spending it, planning campaigns and fighting them, nominating candidates and getting them elected. The work goes on without interruption from one end of the year to the other. These committees and officials of all ranks make up what we call the “party organization.”

Let us examine this organization somewhat more in detail, beginning at the top. Each political party has a national committee consisting of delegates from each state, territory, and dependency. These members are nominally chosen by the national conventions but they are really made by the respective state delegations at these conventions.<sup>1</sup> Each state, then, has its Republican national committeeman, and its Democratic national committeeman to look after the interests of their respective parties. The work of these national committees, each in its own field, covers a wide range. They fix the time and choose the place for holding the national conventions. They issue the calls for the election of the delegates and arrange all the other preliminaries. Then there is the general planning of the election campaign and the selection of subcommittees to take charge of different branches of the work. There is the preparation of campaign literature and its effective distribution. Speakers have to be secured; meetings provided for and announced; local committees must be set to work; causes of friction or dissatisfaction here and there have to be eliminated; campaign funds must be raised

The  
national  
com-  
mittees.

Their  
work.

<sup>1</sup> If, however, the laws of any state make provision for the selection of national committeemen by a direct primary, the selection so made is always ratified by the convention.

and apportioned, canvassing and newspaper propaganda organized, and arrangements made for getting out the vote on election day.

It is not to be assumed, of course, that the national committee looks after all these matters in a presidential campaign. Each member of the committee is to some extent in charge of the arrangements for his own state, coöperating with the state committee. But the detailed work is in large measure delegated to state committees, auxiliary committees, or local party organizations. The general responsibility, however, cannot be delegated, so that, to borrow a military metaphor, the national committee serves as the general staff of the party forces. The state and local organizations form a hierarchy of divisional, brigade, and regimental staffs who direct the operations of their respective units. The theory of party organization is that it is controlled from below, by the men and women in the party ranks. In actual fact, however, the control and direction, as in military organization, comes always from above. It is only in the event of a mutiny that the ordinary soldier in the party's ranks gets any measure of control.

The  
chairman  
of a  
national  
committee.

The national committee has its chairman, who may or may not be one of its members. He is the party's chief of staff and head strategist. Ostensibly he is chosen by the national committee, but in reality he is the personal choice of the party's candidate for the presidency. No man can have too much skill, ingenuity, resourcefulness, or patience for this position. "He must be a master of details, and at the same time capable of taking a correct view of the general situation and endowed with an unlimited capacity for hard work. He must possess the confidence of party leaders and have an almost intuitive grasp of the popular feeling. He must keep in touch with every fibre of the organization, holding frequent conferences with state chairmen in the most important and doubtful states. He must be conciliatory, secretive yet approachable, keen in his choice of helpers, able to command the service of the most effective workers in the party, and capable of making them work in unison without overlapping."<sup>1</sup>

His  
functions.

The national chairman is often a factor of great importance in determining the party's success or failure at a presidential elec-

<sup>1</sup> P. O. Ray, *Political Parties and Practical Politics* (2d ed., N. Y., 1917), pp. 235-236.



tion. He must plan the campaign, select the vulnerable spots in the embattlements of his adversaries, and bolster up the weak places in his own. It is for him to determine what states need particular attention and what states need little or none. He virtually decides how and where the campaign funds of his party shall be spent, allotting them as his judgment dictates to this or that purpose, or to this or that section of the country.

Next in point of importance to the national chairmen are the secretaries of the national committees. Each is in charge of his party's national headquarters, supervising the enormous amount of correspondence which pivots on that point, and handling a legion of details relating to the itineraries of campaign speakers, the publication of campaign literature and the coördination of every campaign activity. These secretaries are paid and permanent officials.

The secretary of the national party committee.

Each national committee maintains a number of sub-committees, or auxiliary committees, made up to some extent from its own members but to a much larger proportion by the selection of prominent party workers outside. Among these auxiliaries the executive committee stands first in importance but there are finance committees of each party, publicity committees, speakers' bureaus, organization committees, and so on. Each of these groups is responsible for some special branch of campaign activities, but all are under the general direction of the national committee and under the immediate supervision of the national chairman.

Auxiliary committee.

The work of the national committee and sub-committees is restricted, for the most part to presidential campaigns. The special function of assisting the party's candidates for Congress is handed over to separate committees, known as the congressional campaign committees. Each party maintains a committee of this type. The chief work of these committees comes midway between presidential elections when congressmen are being chosen in the "off-years." In organization they are like the national committees, being composed of one member from each state and territory.<sup>1</sup> They likewise have their respective chairmen and

The congressional campaign committees.

<sup>1</sup> In the Republican committee there are no committeemen from states which send no Republicans to Congress; in the Democratic committee there is a committeeman to represent every state, even states which send no Democrats to Congress.

secretaries. But their members are chosen differently. The Republicans choose their congressional committeemen at a caucus of Republican senators and representatives; the Democrats have their committeemen named by the state delegations of their party in Congress.

Party  
campaign  
methods.

Now as to the methods which the national party organizations use in their endeavor to win elections. This is a matter upon which it is difficult to write in general terms inasmuch as campaigns are not waged in uniform fashion all over the country. In some sections, where the party is strong and united, the national committee finds little to do. In other sections, where the party's chances of success seem to be hopeless, it will also put forth little of its energy. The Democratic national committee does not bother itself much about a presidential campaign in Texas. Nor does the Republican national committee give its chief thought to Pennsylvania. The result is that efforts are largely concentrated from both sides upon the doubtful states, the states which may be swung from one party column to the other by dint of good strategy, careful organization, and the free expenditure of party funds.

The need  
of tense  
effort in  
a presiden-  
tial cam-  
paign.

In a national campaign all the machinery of the party, and every wheel in it, must be run at full speed. From the smallest village or township committee through the district and state organizations the party's entire strength must be put forth in perfect articulation. For it must always be remembered that the outcome in the nation may hinge upon victory or defeat in a single state. New York turned the scale in 1884; California did likewise in 1916. A relatively slight lapse from sound political strategy was responsible for the defeat of Mr. Blaine in the one case and of Mr. Hughes in the other. On either occasion the shifting of a few thousand votes would have changed the line of presidents. Mishaps of this sort have taught party leaders the value of capable guidance, good discipline, and thorough organization.

Party  
finance.

The activities of a political party in a national campaign require large expenditures. In the campaign of 1920 the Democrats spent more than a million dollars while the Republicans disbursed about five times that amount. Nor do these figures tell the whole story of actual expenditures, for while each national committee has its own fund, so has every state committee.

Likewise the various city, county, district, and town committees have special campaign funds of their own. Being raised and spent independently, these latter are not included in the national totals.

To secure these funds every committee, national, state, and local, has its treasurer and usually its sub-committee on finance. The first step is usually to send out circulars asking for contributions. These circulars go to all party leaders, to all candidates and office holders belonging to the party, to all who have contributed in previous campaigns, and to all others from whom subscriptions may for any reason be expected. Much money comes in by way of response to this preliminary call. Then a second and more urgent appeal is commonly sent to those who have not responded. But no party war chest can be filled by impersonal solicitation. Personal canvassing must also be undertaken, especially to get large contributions. This work is done by the national chairman and the treasurer, hence it is desirable to have as treasurer some one who has a large personal acquaintance with men of means. The national and state committees also have auxiliary committees on finance, the members of which assist the treasurer in this work.

How  
campaign  
funds are  
raised.

Subscriptions to party funds on the eve of a national election come from many sources. Some of them are made by persons who, acting for themselves or for corporations, have more than merely altruistic ends to serve. Men who aspire to office or to future political favors of any sort usually find places for their names upon the subscription rolls. Large sums often come from those who anticipate that the success of one or the other party would affect their own business profits. In the election campaign of 1896 millions were given to the Republican fund by manufacturers who sincerely believed that the Democratic program of free silver and tariff reduction threatened the business interests of the country with ruin. There was a time when corporations and public officials were literally black-jacked into making contributions. Regular assessments were levied upon federal office-holders in proportion to their salaries. These are now things of the past. They are forbidden by the laws and by the civil service regulations. Corporations are now pretty well protected against blackmailing politicians, for by law they have been forbidden to contribute anything to campaign funds.

Where the  
money  
comes  
from.

The  
control  
of cam-  
paign  
funds by  
publicity.

Another factor which has proved of great service in lessening the evils connected with the raising of campaign funds is the practice of requiring the publication of the subscription lists. An act of Congress, passed in 1910, requires the national party committees to file before the day of the election detailed statements of all their receipts and expenses, showing who have contributed to the funds and where the money is being spent. The law no longer looks upon the national party funds as private patrimony to be used as the custodians see fit, but as semi-public money to be collected and disbursed under strict governmental supervision. One salutary result of this has been to make the party leaders more dependent upon small contributors and hence more directly accountable to the rank and file of the voters.

The  
perennial  
cry of  
corruption.

During almost every presidential campaign there is much talk about the excessive expenditures of one party or the other. To say that a national committee is spending five million dollars sounds big. It arouses a cry that money is being poured out by the bucketful "to debauch the electorate." But when you remember that there are more than thirty million voters in the United States, an expenditure of five million dollars is only about sixteen cents per voter. And it would be a pretty poor electorate that could be "debauched" at sixteen cents per head! Do you realize that it would cost two million dollars to print, address, and send through the mails a single campaign circular to every voter in the country?

The whole problem of campaign expenditures goes back to the people. They like a real campaign, the kind that stirs everybody's interest. But a lively campaign is certain to cost a lot of money—money for circulars, for hall rent, for the expenses of speakers, for newspaper advertising, for postage, for parades, for the remuneration of a host of workers, and all the rest. If the people resented all this activity (which is designed to arouse their interest) it would soon come to an end. But they do not resent it; they like it. They complain when the campaign is a dull one. And so long as the people relish the sort of campaign that costs money we may rest assured that money will be spent.

Ramifica-  
tions of  
party in-  
fluence.

The party system, not only during an election campaign but in the intervals between elections, permeates every phase of American political life. The framers of the constitution, were they to rise from their graves, would view this situation with



amazement, yet it is difficult to see how any other outcome of their work could have been looked for. In a federalism where national and state governments have independent spheres of jurisdiction, with a government based upon the principle of division of powers between executive and legislative organs, the party system furnishes the one great coördinating force. The expression and the execution of the people's will must somehow be conjoined in every system of popular government. If this unity is not provided by the constitution or the laws, it will develop outside, usually in the form of a party system.

Why strong parties are needed in America.

This is one reason why the American party system has developed so much more machinery than have the party systems of England or France. The connection between central and local administration, and between the legislative and executive organs in these countries is provided for within the frame of government itself. In the United States no single organ of government, President or Congress, has power to shape the entire national policy. Yet public policy ought to be carried into operation by the organs of government acting in unison, and to secure this accord is the aim of each political party. So whatever the theory of the constitution may be, the party organizations have become in fact the great policy-determining factors in American government. By far the larger part of what Congress does is at the behest of party leaders. By far the larger part of what it puts upon the statute-books is by way of redeeming promises made in the platform of the majority party. "Congress at present constituted," one writer complains, "is ninety-nine per cent politics," and he urges that "the first concern of every economic and moral interest should be to reverse this relation."<sup>1</sup>

Relation of partyism to the American system of government.

Partyism controls Congress.

Such comments display a poor mastery of the science of government. The destruction or even the serious weakening of partyism, whether in Congress or out of it, would impair, not improve, the practical workings of American national government so long as the present constitution of the United States is retained. A federalism, and particularly a federalism which possesses a central government based upon the principle of division of powers, demands the centripetal influence of partyism. Most of the assaults which have been made upon the party system are the result of a failure to comprehend the fundamental aims

The elimination or weakening of the party system would not improve legislation.

<sup>1</sup> Lynn Haines, *Your Congress* (Washington, 1915), p. 40.

and functions of political parties. It is quite true that in their organization and work political parties have developed many excrescences and have often been guilty of public abuses. But to get rid of parties altogether on that account would be a ruthless sort of political surgery. The true task of the reformer, and the one to which his attention should be given, is that of making the party system conform to its professed and proper functions.<sup>1</sup>

<sup>1</sup>The platforms of the national parties are printed, in booklet form, for use in each presidential campaign. The texts of all the major party platforms since 1840, and of most of the minor ones, are printed in Kirk H. Porter's *National Party Platforms* (New York, 1924). The rules and regulations of each party are also printed and a copy can usually be had from the state committeeman. But the actualities of party organization cannot be learned by a mere study of the printed documents. The best way to gain a grasp of the realities is to read the experiences of men who have been active in the organizations, as given in such books as Theodore Roosevelt's *Autobiography* (New York, 1913), Herbert Croly's *Mark Hanna* (New York, 1912), H. E. Gosnell's *Boss Platt* (Chicago, 1923) and W. E. Dodd's *Woodrow Wilson* (New York, 1921). See also the references given at the close of Chapters xxiii and xxxv.

## CHAPTER XXV

### THE JUDICIAL POWER OF THE UNITED STATES

The main reason why the United States has carried out the federal system with unequalled success is that the people of the Union are more thoroughly imbued with legal ideas than any other nation.—*Albert Venn Dicey.*

A federal system of government, if it is to be successful, must have provision for a strong judiciary able to command the respect and acquiescence of the people. Federalism by its very nature implies a division of authority between the central and the state governments with the certainty that disputes concerning the exact range of their respective powers will arise. There must, therefore, be a judiciary strong enough to settle such controversies with fairness to both authorities. The makers of the constitution realized that a decentralized judicial organization would be "a hydra in government from which nothing but contradiction and confusion could proceed," hence by deliberate choice they set up a tribunal which in the extent of its powers had no counterpart in any other land. The wisdom of this action has been fully demonstrated by the way in which the courts have guided American constitutional progress. It may fairly be said, indeed, that the development of a Supreme Court into a final arbiter of constitutional disputes is America's most important contribution to the science of government.

Lord Bryce tells of an educated Englishman who heard that the Supreme Court of the United States had authority to override the laws of Congress and spent two days reading up and down the constitution in a hunt for that particular provision.<sup>1</sup> It is no wonder that his quest proved vain, for the constitution has nothing to say on that point and very little about the powers of the judiciary in any connection. It provides for a Supreme Court, but leaves the organization of that tribunal to

The need  
of a  
strong  
judiciary.

What the  
constitution  
provides.

<sup>1</sup> *American Commonwealth*, i, 246.

Congress. It likewise protects the judges in all the federal courts against improper removal and guarantees that their salaries shall not be reduced. But it is far less explicit with reference to the rights, powers, and organization of the judiciary. This was not, because the makers of the constitution failed to recognize the importance of the federal courts. They were well aware of it. But they were of different minds as to how the courts ought to be constituted, and they ended by laying down a few general principles upon which they were agreed, leaving to Congress the task of determining the details later on. And Congress, by the Judiciary Act of 1789, performed this task at its first session.<sup>1</sup>

Why federal courts were deemed necessary.

What need is there for federal courts? Why not leave all controversies, of whatever sort, to be handled by the state courts? That **had** been done under the Confederation, before the constitution was framed. The answer is that this selfsame experience had shown the defects of such a scheme. The lack of a federal judiciary had been strongly felt during these years, and it was realized that the new national government with its greater powers, would have to lean heavily upon the courts. Questions would arise among the states themselves, moreover, and there should be some judicial authority, standing outside them all, to settle these controversies. There would be controversies bearing on the relations of the United States with foreign nations, on matters covered by treaties, for instance, which could not safely be left to the state courts. But most important of all, disputes would arise as to the meaning of various clauses in the constitution and concerning the interpretation of laws passed by Congress. By whom should such disputes be decided? To leave them to the various state courts would be to invite chaos. Each might render a different decision, so that the constitution and the federal laws would mean one thing here and another thing there. The makers of the constitution decided, therefore, that there would have to be at least one great coördinating tribunal, a federal supreme court independent of the states. "If there are such things as political axioms," wrote Alexander Hamilton, "the propriety of the judicial power of a government being coextensive with its legislative, must rank among the number. The mere necessity of uniformity in the interpretation of the national laws

<sup>1</sup>This law remained in force, with amendments, for well over a hundred years. It was not superseded until 1911.



decides the question. . . . Any other plan would be contrary to reason, to precedent, and to decorum."<sup>1</sup>

These reasons, however, did not necessitate the creation of a whole hierarchy of federal courts. One Supreme Court would have sufficed to maintain the federal supremacy and to insure the uniform interpretation of the laws, leaving to the state courts the function of hearing all cases in the first instance. Nor does the constitution expressly require that there shall be any federal courts other than the Supreme Court.<sup>2</sup> Might it not have been possible, then, for Congress to have refrained from establishing subordinate federal courts and to have empowered the state courts to take cognizance of cases falling within the judicial power of the national government? The framers of the constitution appear to have thought so. As Hamilton distinctly pointed out, the power "to constitute tribunals inferior to the Supreme Court," as enumerated among the powers of Congress, was "intended to enable the national government to constitute or authorize<sup>3</sup> in each state or district of the United States a tribunal competent to the determination of matters of national jurisdiction within its limits."<sup>4</sup> But Congress decided that it would be better for the new national government to have a complete series of its own courts from the lowest to the highest, and on the whole this was the wisest course to take. It was also the safest course for the Supreme Court later decided that Congress has no power to confer jurisdiction on any courts not created by itself.<sup>5</sup>

Two complete sets of courts have arisen.

Before the structure and powers of the various federal courts are explained, it may be well to notice the division of jurisdiction between the federal courts, taken as a whole, and the state courts. The federal courts have jurisdiction over certain classes of controversies named in the constitution; the state courts have jurisdiction over all others. The former cannot be more concisely summarized than by quoting the words of the constitution itself:

The sphere of the federal courts.

<sup>1</sup> *The Federalist*, No. 80.

<sup>2</sup> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish." Article iii, Section 1.

<sup>3</sup> The italics are Hamilton's, not mine.

<sup>4</sup> *The Federalist*, No. 81.

<sup>5</sup> *Houston v. Moore*, 5 Wheaton, 1.

"The judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens, or subjects."<sup>1</sup>

As a model of concise legal phraseology this paragraph is probably unsurpassed in the whole range of juristic literature. Save in one item it cannot be improved. If anyone has doubts on this score let him try to recast the paragraph in his own words. But the very compactness of the wording makes some explanation necessary in order that the full force and effect of these provisions may be properly understood.

1. Cases arising under the federal constitution, laws, and treaties.

First is the reference to cases arising under the constitution and under the laws or treaties of the United States. What does this mean? It means that whenever a controversy involves the interpretation of any clause in the national constitution, or in a federal law, or in a treaty to which the United States is a party, the issue is one which the federal courts have authority to determine. Anyone who claims a right under the constitution, laws, or treaties of the United States may claim it in the federal courts.<sup>2</sup>

Some illustrations.

To take some illustrations: If a person or corporation is being prosecuted in any state court on grounds which seem to infringe any rights guaranteed in the federal constitution (for instance, the right not to be deprived of life, liberty, or property without due process of law), he may seek relief by having his case carried to the federal courts. This he does by applying for a writ of error. Or if any law made by Congress is being applied, all controversies relating to it must come to the federal courts. Or,

<sup>1</sup> Article iii, Section 2.

<sup>2</sup> "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily inspired by and under the constitution and laws of the United States" (*Irvine v. Marshall*, 20 Howard, 558). But the right must be a substantial and not merely an incidental one in order to warrant its assertion in the federal courts. "It must appear on the record . . . that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained." *Cableman v. Peoria, etc. R. R. Co.*, 179, U. S. 335.

again, if a foreign citizen claims that rights given to him by treaty are being denied by any state of the Union, he comes to the federal courts for the enforcement of his claims. Whenever, in fact, one of the parties to a suit asserts that he has a substantial right which arises from the constitution, laws, or treaties of the United States, this gives the federal courts jurisdiction.

Again the judicial power of the national government extends to all cases affecting foreign diplomats. A diplomatic agent of a foreign state is by international law immune from prosecution in the courts of the country to which he is accredited. This provision of the constitution merely operates, therefore, to keep the state courts from a possible infringement of international law. If an ambassador or other public minister of a foreign state commits an offence his recall may be requested, or he may even be expelled; but so long as he remains an accredited diplomat his freedom from legal process is guaranteed. This rule as to diplomatic immunity has been recognized from ancient times.

By "admiralty and maritime" jurisdiction is meant authority over cases which relate to American vessels travelling on the high seas or in the navigable waters of the United States. Such, for example, are controversies regarding freight charges, seamen's wages, damages due to collisions and marine insurance. In time of war it also covers cases relating to prize vessels captured at sea. Admiralty law is a distinct branch of jurisprudence, differing both in substance and in procedure from the common law and equity of the regular courts. For that reason, and also because foreign commerce was placed within the regulating power of the national government, it was deemed wise to vest admiralty jurisdiction in the federal courts.

Likewise the federal courts have jurisdiction whenever the United States is one of the parties to a suit, or whenever the contestation is between two states of the Union, or between "a state and a citizen of another state." The first two clauses of the foregoing sentence are perfectly clear, but the third (the one in quotation marks) is ambiguous. Does it mean that states may be sued in the federal courts by citizens of other states?

A dispute on this point soon arose, and in a noteworthy decision the Supreme Court ruled that such suits might be maintained.<sup>1</sup> The sovereign state of Georgia, it held, could be sued

2. Cases affecting ambassadors, other public ministers, and consuls.

3. Admiralty cases.

4. Cases in which the United States or a state of the Union is a party.

The suability of a state.

<sup>1</sup> *Chisholm v. Georgia*, 2 Dallas, 419.

in the federal courts by a citizen of South Carolina. This ruling was a surprise, because it had been openly asserted, when the constitution was before the states for acceptance, that no state would be amenable to the suit of an individual without its own consent. But the Supreme Court, in making its adjudication, followed the literal wording of the constitution which plainly allows such a construction. At once there was a chorus of protests from the states. They denounced the decision as an impairment of their sovereignty. They had good ground for taking this attitude inasmuch as the principle that a sovereign state is not liable to be sued without its own consent had been recognized from time immemorial. Blackstone spoke of it as "a necessary and fundamental principle." So the states demanded that the constitution be amended in such way as to make this principle clear, and in 1798 the eleventh amendment set the matter right.

The  
eleventh  
amend-  
ment.

By the terms of this amendment the federal courts are expressly forbidden to take cognizance of any suit brought against a state "by a citizen of another state, or by citizens or subjects of any foreign state." Anyone who desires to sue a state must bring his suit in the state's own courts and these courts will not entertain such suits unless they have been authorized to do so by the state laws, in other words unless the state has consented. The states do, as a matter of fact, permit themselves to be sued in their own courts to some extent under prescribed conditions. A state may be sued in the federal courts only by the United States or by another state of the Union.

May state  
officials be  
sued in the  
federal  
courts?

While the doctrine that no state may be sued in the federal courts by its own citizens, or by citizens of another state, or by foreign citizens is now well established, the question whether the officials of a state are equally immune is by no means so unclouded. In general the Supreme Court has endeavored to determine whether the suit is really against the state through one of its officers, or whether it is against a state officer as an individual. In the former case it will not assume jurisdiction; in the latter it has maintained its right to entertain suits against those who "while claiming to act as officers of the state, violate and invade the personal and property rights of the plaintiffs under color of authority."

Finally, the jurisdiction of the federal courts extends to all controversies between foreigners and American citizens, and be-



tween citizens of different states. It is cases of this sort that bring the largest grist to the federal mills. A corporation or company is presumed for purposes of jurisdiction to be a citizen of the state in which it was chartered or incorporated, although it may be doing the larger part of its business in other states.<sup>1</sup> When a corporation brings a suit, or a suit is brought against a corporation, the chances are, therefore, that the two suitors will be of diverse citizenship. But diversity of citizenship does not of itself entail the bringing of a suit in the federal courts, for the national laws provide that all such cases shall be left to the state courts if no question of federal right is involved and if the amount in controversy does not exceed a certain sum. This action has been necessary to protect the federal courts from being overwhelmed by a flood of trivial suits.

When the constitution provides, therefore, that the judicial power of the United States shall extend to various classes of controversies, it does not mean that the federal courts must assume *exclusive* jurisdiction in all such cases. Congress determines how far the exclusive jurisdiction shall extend; it may give to the federal courts the whole field or only a part of it. Thus far Congress has given the federal courts exclusive jurisdiction in all suits to which the United States is a party, all suits between two states or between a state and a foreign nation, and certain suits arising under the national laws. In all other cases the state courts have been permitted by Congress to assume concurrent jurisdiction. That is, the plaintiff has the option of commencing the suit in a federal court or in the courts of his own state, or in the courts of a state where the defendant resides. This option is subject, however, to the limitation mentioned at the end of the preceding paragraph.

Let no one imagine, then, that the actual jurisdiction of the federal courts is a simple matter to understand or to explain. It is perhaps the most difficult topic in the whole range of American government. The division of jurisdiction between the two sets of courts is very subtle at some points—even good lawyers are not always sure of their ground. It results in all sorts of strange things which bewilder the layman. An employee of a national bank embezzles a sum of money; he is tried in a federal court and sentenced to a term in a federal penitentiary. Di-

5. Controversies between citizens of different states.

But this jurisdiction is not exclusive in all cases.

Difficulties of the subject.

<sup>1</sup> See *above*, p. 97.

rectly across the street an employee of a state bank or trust company embezzles the same amount; he is tried in a state court, given a different sentence and sent to a state prison. Such things puzzle the reader of the newspapers. But the explanation is simple enough—the nation and the states have respectively the right, through their own courts, to enforce their own laws.

Summary.

The authority of the federal courts covers a wide area and the amount of judicial business which comes before them is very large. Summarizing it all, one can say that many suits appear on the dockets of the federal courts because of their subject-matter, that is because they concern matters dealt with by the constitution, laws, or treaties of the United States. Many others arise there because of the sovereign character of the parties concerned, as for example suits to which the United States is a party or controversies in which two states are contestants. Others, again, begin in the federal courts, or are ultimately carried there, because the suitors (whether individuals or corporations) are not of the same citizenship. A plaintiff begins his suit in a state court; then the defendant (if he be a citizen of a different state) may desire to have it transferred to the federal courts and he is entitled under certain conditions to have this done.

The law and equity of the United States.

So much for the jurisdiction of the federal courts. What is the law which they administer? Speaking broadly, it is made up of two branches, the common law and statutes.<sup>1</sup> The common law is the oldest branch of American law. Its development began in mediæval England when there were few written rules and when the royal courts decided cases, so far as they could, in accordance with the unwritten usages or customs of the people. Gradually the decisions of the courts in such matters grew more and more uniform, until this judge-made law or body of usages became "common" to the whole realm of England, although it had never been enacted as the law of the land by any parliament or other law making body. It is not to be assumed, however, that the common law stood unstirred and changeless on its mediæval pedestal. Developing in accordance with the needs of civiliza-

The two branches of law :  
(a) The common law.

Its history in England.

<sup>1</sup> Occasionally they also administer "admiralty law," a code of maritime rules inherited from England which has been considerably modified by acts of Congress, and they also apply the rules of international law when the need arises.

tion, it slowly broadened down from precedent to precedent. It adapted itself through the centuries to the genius of the Anglo-Saxon race. In the course of time, moreover, this whole system of common law was reduced to written form by great text-writers or commentators, Glanvil, Bracton, Coke, Littleton, and Blackstone.

During the colonial period the common law followed the English flag across the Atlantic. Its principles and procedure were applied by the judges in the American colonies. The Declaration of Rights adopted by the first Continental Congress in 1774 spoke of it as a heritage. "The respective colonies," it asserted, "are entitled to the common law of England." When the thirteen colonies shook off British political control, therefore, they did not root out the common law. It remained, and still persists, as the foundation of the legal system in the nation and in all the states but one. Only in Louisiana did the common law fail to get an initial foothold. There, through the colonization of the country by the French, the jurisprudence of France became the basis. Even in Louisiana, however, the system of trial by jury and other common law institutions have had a profound effect upon the judicial system.

Its transplantation to America.

But although the common law of England remains the basis of the American legal system, it has ever kept growing and changing, widening and narrowing, in the New World as in the Old. This steady transformation of the American legal system has been accomplished in part by judicial decisions but in larger measure by the enactment of statutes which have modified or even supplanted the rules of common law on many matters. A statute or act of a legislature may merely reenact with slight changes what has been the common law, or it may set the rules of the common law on any point entirely aside. Where the common law and a statute are inconsistent the latter always prevails.

Its development there.

Common law in the United States is the common law of the states, not of the nation. There is no body of federal common law distinct from the common law of the states in the sense that there is a body of statute law enacted by Congress distinct from the statute law enacted by the state legislatures. The federal courts, insofar as they apply the rules of the common law, follow these rules as they exist in the state where the

We have no "national" body of common law.

controversy arose; but they are not absolutely bound to do this and they have sometimes departed from the local rules. In some matters the federal courts are gradually building up by their decisions a body of law which is different from the common law of the states. This is sometimes called "federal common law." It is federal in origin and is tending to become uniform throughout the whole nation. But as yet it covers a very small part of the whole legal field.

(b) Statutory law.

Statutory law, as distinguished from common law, is law made by some regular lawmaking body. It may be framed by a constitutional convention, in which case we call it a constitution. A constitution is of the nature of statutory law, supreme statutory law. By far the greater part of statutory law is made, however, by Congress, by the state legislatures, and by municipal councils. The output of these bodies is called laws, acts, statutes, and ordinances.<sup>1</sup> These enactments supplement or alter the common law as the case may be. The total production of statutory law by Congress, by the forty-eight state legislatures, and by thousands of subordinate lawmaking bodies is of prodigious dimensions and it keeps increasing every year. Statutory law, in all its branches, now forms by far the larger portion of American jurisprudence as a whole. But its importance is not commensurate with its bulk. These thousands of statutes have supplemented the common law, filled in the gaps, and altered it at times; but they have not made it cease to be an underlying force in the legal system of the country. No lawyer knows the law of the land unless he has mastered the principles of the common law. In the law schools it is common law, for the most part, that teachers teach and students study. Some states have enacted comprehensive codes of law which it has been found that a great deal of common law remains in

Superiority of the common law.

The common law is an old standby; it has done valiant service that are old; things. But many people are impatient with things

<sup>1</sup>The terms "laws," "acts," and "statutes" are usually confined to the enactments of Congress and the state legislatures, while the term "ordinances" is used to designate the enactments of municipal councils and other subordinate lawmaking bodies. In towns and townships they are often called "bylaws."



in law as in everything else. So they urge their congressmen or assemblymen to change the rules of the common law and modernize them "to meet new conditions." And these legislators, without a study of all the consequences, proceed to replace some time-hallowed legal rule with a newfangled provision of their own manufacture. "Common law is common sense," runs an old aphorism. A good deal of our statutory law is not.

The constitution speaks of the federal courts as being entitled to jurisdiction "in law and equity." What is equity? To explain the substance, procedure, and limitations of equity jurisprudence would take far more space than could be accorded to that subject in any general book on American government. The layman thinks of "equity" as something inseparably associated with abstract justice and conscience; but equity as administered by the courts is merely a formal set of rules which must be applied with an unfaltering hand, even as laws are applied.

Equity.  
What it is.

The origins of equity are interesting. In mediæval England there grew up, side by side with the common law, a system of rules administered by a special royal court, the Court of Chancery, which aimed to give redress to individuals in cases where the common law afforded such redress inadequately or not at all. This Court of Chancery was the "keeper of the king's conscience" and its intervention at the outset was confined to the granting of relief from the legal consequences of accident or mistake. Every such case was adjudged on its own merits. Gradually, however, definite principles or rules were evolved to cover all cases of the same sort. In the course of time these rules were reduced to written form; and taken together they became known as equity.

Its origin.

Equity came to the American colonies with the common law. It was retained after the Revolution and has been developed. To-day both law and equity are usually administered by the same federal courts. The differences between the two are both numerous and technical, but in general equity applies only to certain classes of civil actions and never to criminal cases; its procedure is simpler; a jury is not ordinarily used to determine the facts at issue, and its remedies are more direct. A suit at law, for example, is a request for an award of damages; a petition in equity usually asks for a decree or for an injunction; that is,

Its development.

Its nature.

for an order specifically compelling a person to do or not to do a thing. It is characteristic of equity that it deals directly with persons or acts *in personam*, while the law in civil actions deals chiefly with material things at issue, or acts *in rem*. Over some matters equity has exclusive jurisdiction; over others its jurisdiction is concurrent with that of the law. Within the first category redress must be sought at equity; in the latter there is, under certain limitations, the option of equity procedure.

All branches of law are administered by the same courts.

The federal courts, within the fields of jurisdiction allotted to them by the constitution, administer both common and statutory law, and equity as well. The statutes which they apply are for the most part acts of Congress, but very frequently (as in the case of controversies between two states or between citizens of different states) the work of the federal courts is concerned with the interpretation and application of state laws. In such cases, if the state courts have already given an interpretation of the law concerned, the federal courts will ordinarily accept such interpretation. The rules of equity, as applied by the federal courts, are determined by these courts for themselves. They do not necessarily follow the equity jurisprudence of the state in which the case arises.

Congress controls the procedure of the federal courts.

The procedure of the federal courts, including their rules of evidence, the regulations concerning appeals, and all other matters relating to their actual work are left by the constitution to the discretion of Congress. These matters were covered to some extent by the Judiciary Act of 1789 and by the various amendments to that statute, all of which were revised and codified by a general law in 1911. On many minor points of procedure, nevertheless, Congress has empowered the courts to make their own rules.

But subject to various limitations.

The constitution, however, contains many limitations upon this power of Congress to regulate the procedure in the federal courts—limitations designed to insure fair trials and to preclude injustice to any of the parties. These limitations, which are set forth in the bill of rights, relate to such matters as grand jury hearings, jury trials, promptness and publicity in judicial proceedings, double jeopardy, self-incrimination, the issue of warrants, and the nature of punishments. They apply to the federal courts only and do not govern the procedure in state tribunals. But this is not a matter of much practical conse-

quence because each state constitution has its own bill of rights with very similar provisions and these apply to the state courts.

No one may be held to trial in a federal court for any "capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."<sup>1</sup> A grand jury is a body of men, not exceeding twenty-three in number, selected by lot or by some other established procedure, and sworn to discharge impartially the duty of investigating all alleged offences which may be brought to their attention by the prosecuting officers of the government. In other words the grand jury conducts an investigation, not a trial. Witnesses are summoned before it and sworn, but are not cross-examined. If it finds that there is a *prima facie* case against any person, it returns a "true bill" or indictment against him and he is held for trial. If, on the other hand, it finds no reasonable ground for holding a person to trial, it returns "no bill" and he is discharged. A grand jury may undertake investigations on its own initiative, and occasionally it does conduct an enquiry into the actions of some public officer.

In all criminal cases (except impeachments) and in all civil suits at common law, where the amount involved is more than twenty dollars, the national constitution requires that trials in the federal courts shall be by jury.<sup>2</sup> This jury, in criminal cases, must be selected from the state and district in which the crime is alleged to have been committed. If the offence is committed outside the limits of any state, the trial may be held and the jury selected wherever Congress shall by law direct. And no question of fact (as distinguished from a question of law), when tried and determined by a jury, may be re-tried in any higher court except by the same methods. No higher court, sitting without a jury, can ordinarily set aside any conclusions of fact reached by a jury in a lower court. The Supreme Court of the United States, for example, sits without a jury. Consequently it hears arguments on disputed points of law only; it does not reopen a controversy as to the facts.

Nature of these limitations:

(a) the need of grand jury action  
What the grand jury is and does.

(b) the requirement of jury trial.

<sup>1</sup> Amendment vi. An "otherwise infamous crime" has been construed to be one to which a penalty of imprisonment for more than one year is attached. The constitution makes an exception to the grand jury requirement in the case of the military and naval forces. The distinction between presentment and indictment is now of no practical importance.

<sup>2</sup> The constitutional right to a jury trial is one which may be waived in any case by the consent of both parties.

What a  
trial  
jury is  
and does.

A trial jury, or petit jury as it is sometimes called, is a body of twelve qualified persons, selected either by lot or in accordance with other legally established method, and sworn to try impartially a particular case, rendering a true verdict thereon in accordance with the evidence. It is usually required that persons called for jury service shall be qualified voters but there is no necessary connection between the right to vote and the obligation of jury service. Certain classes of persons are exempted by law from the obligation to serve on juries; the exemptions usually include physicians, attorneys, public officials, teachers, and so on. Persons called for service at each term of the court are known as veniremen or talesmen; they make up a panel from which the twelve jurors are selected after due inquiry has been made concerning their impartiality and competence. The parties to the trial have the right to challenge any member of the panel for stated cause. The right to challenge peremptorily, that is, without assigning any cause, is also granted under certain limitations. The selection of the jury is complete when twelve persons, against whom no valid challenge has been interposed, are duly sworn and assigned to places on the jury bench.

Functions  
of the jury.

A trial jury hears such evidence as the presiding judge permits to be presented. The admissibility of evidence is a matter of law for the judge, not for the jury, to decide. But the value of the evidence, when once admitted, is a matter of fact for the jury to determine. Most suits at law resolve themselves into questions concerning the relative credibility of evidence submitted by the opposing sides. When the evidence has been presented and the arguments of counsel heard, the judge instructs or "charges" the jury on their legal duties and on matters of law only, with no intimation of his own opinion as to the facts of the case. Jury verdicts in the federal courts must be unanimous.<sup>1</sup> If the jury fails to reach unanimity it reports a disagreement and is discharged. Then the case has to be tried all over again. A presiding judge may set aside a unanimous verdict if he finds that the jury has disregarded his rulings on points of law, or if he is satisfied that the verdict is clearly against the weight of the evidence, or if there has been any

<sup>1</sup> In some state courts, as will be seen later, a majority suffices to secure a verdict in civil trials.



serious irregularity in the methods by which the jurors have reached their verdict. In such cases the presiding judge cannot himself render a different verdict, but merely orders a new trial.

Certain other essentials of procedure in the federal courts are prescribed by the constitution. It is required that trials shall be speedy and public, that a person charged with crime must be informed of the nature and cause of the accusation; that he shall be confronted with the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, and that no person in any criminal case shall be compelled to be a witness against himself. Finally, an accused person is entitled to have the assistance of counsel in his defence. Excessive bail must not be required, nor cruel and unusual punishments inflicted. No warrants may be issued, except upon probable cause supported by oath and definitely describing the place to be searched or the persons to be arrested. All these requirements are imposed by the supreme law of the land and Congress has no power to set any of them aside. Let it be repeated, however, that they apply to the administration of justice in the federal courts only and have no relation to the procedure of the state courts. An erroneous impression on this matter has become widespread. People will tell you glibly that a policeman cannot search your house without a warrant because "the Constitution of the United States forbids it." But the Constitution of the United States does nothing of the sort. As interpreted by the Supreme Court it merely provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [by the federal courts or their officers] and no warrants shall issue [from the federal courts] but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

A policeman is a state officer and if he is debarred from searching your house without a warrant it is because the *state* constitution or state laws so provide.

The constitutional protection of all accused persons against second jeopardy requires a word of explanation. "No person," the constitution provides, shall be subject "for the same offence to be twice put in jeopardy of life or limb." The application of this rule is that where a person accused of crime has been tried

(c) other securities for fair trials.

Twice in jeopardy.

and acquitted in a federal court, he cannot be again tried by any federal court for the same offence. It matters not if new evidence has been discovered; the verdict of acquittal is conclusive and cannot be reopened. When an accused person is acquitted, the government has no right of appeal to any higher court against such verdict. But if an accused is convicted an appeal can usually be taken on his behalf. Instances arise occasionally in which the same act may be made the basis of two distinct accusations, as for example the passing of counterfeit money, which is both a statutory offence under the laws of the United States and a fraud under the laws of a state. Selling shares in a fraudulent enterprise is an offence against the common law of the state; if it is done through the mails it is also an offence against the laws of the United States. In such cases the acquittal on one charge is not a bar to trial on the other.

The insertion of these various limitations in the bill of rights is an indication of the jealousy with which Americans in the closing years of the eighteenth century regarded the fundamental rights of the citizens. They were not satisfied with the national constitution until these provisions had been added to it. They knew from their experience in colonial times that legislatures and courts, as well as kings and governors, could become arbitrary and tyrannical. They were wise in their generation.<sup>1</sup>

<sup>1</sup> Simeon E. Baldwin's *American Judiciary* (N. Y., 1905) is the best general book on the subject of the foregoing chapter. Mention should also be made of J. C. Rose, *Elementary Treatise on the Jurisdiction and Procedure of the Federal Courts* (Baltimore, 1915). Limitations on court procedure are expounded fully in Cooley's *Constitutional Limitations* (see *above*, p. 355) and in the various manuals of constitutional law (cited *above*, pp. 35-36). See also the references at the close of Chapters xxvi and xxxiv.

## CHAPTER XXVI

### THE SUPREME COURT AND THE OTHER FEDERAL COURTS

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been so frequently misunderstood as the duties assigned to the Supreme Court and the functions which it discharges as the ark of the constitution. Yet there is really no mystery about the matter. It is not a novel device. It is not a complicated device. It is the simplest thing in the world if approached from the right side.—*Lord Bryce.*

The regular tribunals of the United States consist of a Supreme Court, nine circuit courts of appeals (one for each of nine circuits into which the country is divided), and eighty-one district courts.<sup>1</sup> These make up the federal judiciary. The Supreme Court is established by the constitution; the others have been created by statute.<sup>2</sup>

Names of  
the  
federal  
courts.

Go into the Capitol at Washington about noon on any week day except Saturday during the period from October to June and you will see a small procession of distinguished-looking men, robed in silk gowns, passing through the long corridor into a chamber where a clerk in stentorian tones begins to cry out "Oyez! Oyez!"<sup>3</sup> This is the Supreme Court of the United States, the highest court in the land, and the most powerful tribunal in the world.

The Supreme Court is composed of a chief justice and eight associate justices, each appointed by the President with the

The  
Supreme  
Court:  
how con-  
stituted.

<sup>1</sup> In addition there are two special courts, namely, the Court of Claims and the Court of Customs Appeals. The courts of the District of Columbia, the courts of Hawaii, of Alaska, and of the insular possessions are also federal courts inasmuch as these territories are completely under the control of the national government.

<sup>2</sup> Although the Supreme Court is established by the constitution its form of organization, the number of justices, their salaries, and so on, are fixed by statute.

<sup>3</sup> Old French for "Hear Ye!" The custom of opening a court with this formula goes back to the Plantagenet age in English history.

Its original and appellate jurisdiction.

consent of the Senate to hold office during good behavior. No justice may be removed except by impeachment. The court meets at Washington and its sessions usually last from October until May. It has its own court officials and makes its own rules of procedure. With the exception of two classes of controversies, namely, those involving ambassadors or other public ministers, and those to which a state is a party, all matters heard before the Supreme Court come to it from lower federal courts or from states courts. In the two instances mentioned the Supreme Court has original jurisdiction. The exercise of original jurisdiction is, however, very uncommon.

How its business is done.

The Supreme Court, when in session, meets in the room which was originally used by the Senate. Its sessions are mainly devoted to hearing the oral arguments of attorneys, who subsequently file printed briefs for the justices to study. On Saturday of each week the justices confer in their own room upon the cases which have been argued; the various points presented to them in the oral arguments and in the printed briefs are discussed, and a decision is reached by majority vote.<sup>1</sup> The chief justice then designates one of his associates to write the court's opinion in full.<sup>2</sup> When this has been prepared there is a further discussion, with such changes in the wording as may be decided upon, and the document is then handed down to be printed as the decision of the court. Any justice who dissents from the decision of the court may write a dissenting opinion and have it printed also; or several justices may join in submitting a dissenting opinion. If a justice should agree with the decision of the majority, although not agreeing with the reasons for it, he may write a "concurring opinion." These decisions and opinions are printed in a series of *Supreme Court Reports*; they fill two or three volumes each year.<sup>3</sup>

<sup>1</sup> At least six justices must be present during the hearing of the case. If the court is evenly divided (say four against four, with one justice absent) it is customary to order a rehearing of the case.

<sup>2</sup> In some cases the chief justice may himself write the opinion.

<sup>3</sup> The official reports of the Supreme Court were published each year prior to 1874 under the name of the reporter; since that date they have appeared as successive volumes of *United States Reports*, the first volume being numbered as volume 91. The names of these court reporters were as follows: Dallas (1790-1800); Cranch (1801-1815); Wheaton (1816-1827); Peters (1828-1843); Howard (1843-1860); Black (1861-1862); Wallace (1863-1874). Hence the manner of citing Supreme Court decisions as 2 Dall. 191, or 7 Wheat. 64, or 230 U. S. 105, for example.



Cases may be brought before the Supreme Court in any one of three ways, by original suit there, by the removal of a case from a state court, or by appeal. The original jurisdiction of the highest tribunal is limited, as has been said, to two classes of controversies which arises but rarely.

How cases may come before it :

1. By original suit.

Jurisdiction by removal is much more common. Whenever a suit is brought in a state court and one of the parties believes that because of its subject-matter, or the diverse citizenship of the suitors, or for any other legal reason it ought to be tried in a federal court he is privileged to ask its removal thereto. When so removed it may go directly to the Supreme Court, but more often it will be transferred to one of the lower federal courts.

2. By removal.

Most cases come before the Supreme Court by appeal either from a state court or from a subordinate federal tribunal. The usual process of appeal is by writ of error. A writ of error is a formal order by which a superior tribunal instructs a subordinate court to transmit to it the record of any case which has been decided in the court below. The suitor who secures such a writ is then called "the plaintiff in error" and his opponent becomes "the defendant in error" no matter what their respective positions may have been originally.

3. By appeal.

The popular notion that anyone not satisfied with the decision of the highest tribunal of his own state may carry his case before the Supreme Court of the nation is far from being in accord with the facts. No case may be appealed from state to federal jurisdiction except where the interpretation of the constitution, statutes, or treaties of the United States becomes involved, and more particularly where some right, privilege, or immunity guaranteed by the federal constitution is in jeopardy. Most controversies which begin in the state courts end there. If, however, a case is carried through the highest state court and an appeal is permitted, this appeal goes directly to the Supreme Court of the United States. No subordinate federal court has any authority to hear and determine an appeal from the highest state court.

Not all cases may be appealed.

The amount of business which comes before the Supreme Court is very large. It is not uncommon to find a thousand cases upon the docket when its session begins in the autumn. To keep pace with this work the court's adjudications must

The pressure of Supreme Court business.

maintain an average of about thirty cases a week, which means a great deal of drudgery in the studying of briefs and the writing of decisions. Be it borne in mind, however, that nothing comes before the Supreme Court except as the result of an actual controversy. The court does not concern itself with hypothetical questions. It does not prepare "advisory" opinions for the guidance of public officials as some of the supreme courts do in the individual states.<sup>1</sup> In 1793 Washington submitted to the federal Supreme Court a series of questions concerning the rights of the government, but the justices respectfully declined to answer.

The Supreme Court of the United States began its work in 1790 with John Jay as its first chief justice. He had with him five associate justices, more than were really needed to handle the small amount of business which came before the court. At its first meeting no cases appeared; the court appointed a clerk and then adjourned for lack of anything else to do. During the first ten years of its history the court decided only six cases involving questions of constitutional law, and when John Marshall became chief justice in 1801 there were only ten cases awaiting him on the docket. Thus far the court had not exercised any great influence on the nation's political development. Its most important decision upon a constitutional question, moreover, had created a storm of protest and had been set aside by the action of the states in adopting the eleventh amendment.<sup>2</sup> The prestige of the court was relatively small, and a position upon its bench during these early years was regarded as less attractive than the post of a governor or senator. Chief Justice Jay, for example, resigned from the Supreme Court in 1795 to serve as governor of New York.

During the next few years the position of chief justice was bandied about somewhat;<sup>3</sup> but in 1801 John Marshall was given the reins and he held them firmly for more than three decades. Born in Virginia, he saw service as a captain in the Revolutionary army when only twenty-one years of age. While still a

<sup>1</sup> See *below*, pp. 523-524.

<sup>2</sup> *Chisholm v. Georgia* (1793). See *above*, p. 389.

<sup>3</sup> On Jay's resignation John Rutledge was named chief justice and assumed the office, but was not confirmed. Then the post was offered to William Cushing, who was already an associate justice, but he declined it. Oliver Ellsworth was then (1796) appointed and confirmed. He resigned in 1800.

Land-  
marks  
in the  
Supreme  
Court's  
history.

Its chief  
justices.

1789

John  
Marshall.

young man he studied law and entered politics, like so many other young Southerners of his day. Although not one of those who framed the federal constitution, Marshall was a member of the Virginia convention which ratified it in 1788, and was on intimate terms with the founders of the Virginia dynasty. He declined the post of attorney-general in Washington's cabinet, but was elected to Congress and later became secretary of state under President Adams. He was holding this post when he became chief justice. Marshall was a Federalist in the original and genuine sense of the term, a believer in a strong central government, and he lost no opportunity of making his influence felt in that direction. When he became chief justice the powers of the national government under the constitution were not sharply defined; scarcely a clause of the constitution had been subjected to judicial interpretation. To the work of making it "efficient," however, Marshall and his associates promptly set their hands. A succession of great decisions during the next thirty years not only cleared the constitutional horizon but enormously strengthened the lawmaking arm of the national government and incidentally raised the court to a position of great authority.

His constitutional views and influence.

John Marshall was not only a great jurist but a man of firm and clear convictions. He had the advantage of a clean slate to write upon. There was as yet no long train of decisions to hamper the court's freedom, and of course no doctrine of *stare decisis*, inasmuch as there were no decisions to let stand. On the other hand his task was one of great difficulty, for the period through which he guided the Supreme Court was critical in many ways. The issues which came up for adjudication were drawn reeking from the shambles of partisan warfare, and the court on more than one occasion had to take grounds which aroused strong resentment. State officials everywhere looked with suspicion upon what seemed to be a steady encroachment upon state powers. During his thirty-four years of service Marshall wrote the decisions of the court upon no fewer than thirty-six important questions of constitutional law.<sup>1</sup> In these he not only laid the foundations but raised the whole framework of federal jurisprudence.

The man and his work.

Two principles of constitutional construction Marshall enun-

<sup>1</sup> These include such great landmarks as *Marbury v. Madison*, *McCulloch v. Maryland*, *Gibbons v. Ogden*, and the *Dartmouth College Case*.

His principles of constitutional construction.

ciated and maintained. In the first place he insisted that every power claimed by Congress must be articulated to some provision of the constitution, the onus of finding an express or implied grant of power being imposed upon the federal authorities. But, in the second place (and here is where he made his great contribution), Marshall held that any grant of power, when once found, should be interpreted liberally, giving to Congress all reasonable discretion as to how the authority should be exercised. Both these principles are in full force and effect to-day.

Lord Bryce's estimate.

"No other man," says Lord Bryce, "did half so much either to develop the constitution by expounding it, or to secure for the judiciary its rightful place in the government as the living voice of the constitution. No one vindicated more strenuously the duty of the court to establish the authority of the fundamental law of the land; no one abstained more scrupulously from trespassing on the field of executive administration or political controversy. The admiration and respect which he and his colleagues won for the court remain its bulwark: the traditions which were formed under him have continued in general to guide the action and elevate the sentiments of their successors."<sup>1</sup>

It was under Marshall's leadership that the court first undertook to assert its place as the guardian of the constitution, with authority to invalidate any law, whether state or federal, which contravened the provisions of this instrument. By so doing the court assumed a power which was not expressly given to it by the constitution, a power which even at the present day some students of political science believe to have been a usurpation. Whether the court's action was originally the exercise of a right or a usurpation is a much-involved question; whole books have been written about it.<sup>2</sup> There is no good reason why even a brief summary of the arguments on either side should be incorporated in this chapter, for the essential facts have been given

The court's power to declare laws unconstitutional.

<sup>1</sup> *The American Commonwealth*, i, 268.

<sup>2</sup> For a full discussion of it see C. A. Beard, *The Supreme Court and the Constitution* (N. Y., 1912); C. G. Haines, *The American Doctrine of Judicial Supremacy* (N. Y., 1914); E. S. Corwin, *The Doctrine of Judicial Review* (Princeton, 1914); W. M. Meigs, *The Relation of the Judiciary to the People* (N. Y., 1920); A. C. McLaughlin, *The Courts, the Constitution and Parties* (Chicago, 1912); Brinton Coxe, *Judicial Power and Unconstitutional Legislation* (Philadelphia, 1893), and J. B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (Boston, 1893).



in a previous chapter.<sup>1</sup> Whether a right or a usurpation in its origin, the judicial supremacy of the Supreme Court over the laws of Congress and the laws of the state, insofar as they conflict with the national constitution, is now a fact, an indisputable fact, a fact that everybody recognizes.

Four actualities of American government, in this connection, are about as well established as it is possible for even actualities to be. In the first place the Supreme Court has long since made good its claim to declare laws unconstitutional. Congress, the state legislatures, and the country have accepted this *fait accompli* for more than one hundred years. They may dislike it, but they do not deny its existence.

Second, the action of the court in thus asserting the doctrine of judicial supremacy has proved beneficial in its results. Had the court assumed a different attitude the American constitutional system would have become a hydra-headed monstrosity; it would never have gained that strength and regularity of operation which it possesses to-day. In order to protect individual liberty there must be an arbiter between the governing powers and the governed. The integral maintenance of a proper balance of authority between the nation and the states also demands it; and so does the preservation of the adjustment between the executive and legislative organs of government. "The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our whole system."<sup>2</sup>

Third, the power now exercised by the Supreme Court of the United States is one which has been rarely exercised by the other high tribunals of the world. Until very recent years no court in any other land has openly ventured to nullify laws enacted by the highest legislative authorities. During the past decade the supreme court of Argentina has refused to uphold statutes believed to be in conflict with the constitution of that country. But no court in Great Britain, France, Germany, or Italy has yet overturned a national law on grounds of unconstitutionality.

1. This power is now beyond dispute.

2. Its exercise has proved beneficial.

3. It is almost a unique power.

<sup>1</sup> See *above*, pp. 63-66.

<sup>2</sup> Woodrow Wilson, *Constitutional Government in the United States* (N. Y., 1911), p. 142.

4. It fits  
the  
national  
psy-  
chology.

While the power exercised by the Supreme Court of the United States is almost unique in the history of government, it fits the American temperament. No part of the American scheme of government, indeed, is better fitted to the national psychology. It means that Americans refer to an impartial tribunal, made up of eminent jurists, the great questions of governmental jurisdiction which are so liable to excite the political passions of the people. If the rulings of this body are not always agreeable to the popular sentiments of the day it is because neither judicial nor public opinion is infallible. The doctrine set forth by Jefferson in the Virginia and Kentucky resolutions that "as in all other cases of compact among parties having no common judge, each party (presumably each state) has an equal right to judge for itself" would have utterly disintegrated the nation. That absurd theory has long since been ridiculed out of existence. The Supreme Court, when all is said, represents as near an approach to a strictly non-partisan body as the makers of any government have ever been able to devise.

What it  
needs for  
continued  
success.

The smooth working of this judicial supremacy predicates among the people that trait of national temperament which Professor Dicey call "the spirit of legalism." A better phrase would be "popular respect for judicial decisions." Such an attitude undoubtedly exist in the United States, and its importance can hardly be overestimated. The country accepts the rulings of the Supreme Court with disappointment at times; but it does not rise up and denounce the justices as venal or incompetent. It has always accepted even the most unpopular decisions with remarkable self-restraint. This is not because Americans have an exaggerated respect for the wisdom or impartiality of their highest tribunal, but because they have a traditional admiration for the constitution itself and for the scheme of free government which that document establishes. "Not having a king to venerate," a facetious European once remarked, "the American people bestow their homage upon a constitution."

But if that be true, it is small wonder. The reign of the constitution has been long in the land. No monarch was ever so full of years or saw so much accomplished in his day. It commands the homage of the people because they have found it to be no mere welter of words set down on paper but a vital factor in the life and development of the nation. The Supreme Court

has had no small part in making it so. It was the judges who drew water from the rock by commanding arid phraseology to yield forth national strength and power. No people have an instinctive respect for constitutions, laws and judicial decisions. They must be schooled to it by habit. It is a genuine compliment to the American judiciary to say that a spirit of legalism prevails among the people.

Another reason why the Supreme Court has gained the confidence of the people is to be found in its consistent refusal to decide political questions. On various matters which have come before it the court has ruled that questions of public policy must be left within the discretion of Congress, and that the decisions of this body must be accepted as final. In one notable instance the Supreme Court held that it was for Congress and the President, and not for the judiciary, to decide which of two rival governments within the same state ought to have recognition.<sup>1</sup> In another case it declined to render any opinion as to the length of time during which the military occupation of Cuba might continue, holding that matter to be entirely "the function of the political branch of the government."<sup>2</sup>

Its  
abstention  
from  
political  
opinions.

The foundations of the Supreme Court's prestige and power were firmly laid in Marshall's time. Marshall died in 1835. His successor, Roger B. Taney of Maryland, was a man of different stripe, a disciple of Andrew Jackson, and a staunch exponent of the doctrine of states' rights. Under Taney's guidance there was a reaction against the centralizing of powers in the federal government. Taney's most notable decision was that delivered in the Dred Scott Case (1857). In this case the court applied rules of strict construction to the powers of Congress even within the territories of the United States, holding that Congress had no right to prohibit any citizen from owning slaves in such areas. "No word can be found in the constitution," said Taney, "which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description." In some of its decisions during the early years of the Civil War, moreover, the court placed obstacles in the way of a full exercise of the national government's powers, notably in its decision that the President

Marshall's  
successor:  
Roger B.  
Taney.

<sup>1</sup> *Luther v. Borden*, 7 Howard, 1.

<sup>2</sup> *Neely v. Henkel*, 180 U. S. 109.

could not of his own authority suspend the privilege of the writ of habeas corpus.<sup>1</sup>

Salmon P.  
Chase.

After a service of twenty-eight years, Taney gave way in 1864 to Salmon P. Chase of New Hampshire. Chase had served during the first three years of the Civil War as a member of Lincoln's cabinet. During his term of nine years as chief justice the problems of concluding the war and of reconstruction sent many vital questions before the court for adjudication. But in the main it firmly upheld the hands of the national government, especially in sustaining the constitutionality of the reconstruction acts.<sup>2</sup> The war left many troublesome legacies, some of which were not disposed of for twenty years after its close.

The court  
and the  
new order.

With the older issues of slavery and state rights out of the way the work of the Supreme Court during the past fifty years has been mainly concerned with the solution of economico-legal problems, that is, with legal issues which are closely related to questions of industry and trade. Its great decisions during this half century have had to do with the regulation of corporate business, with taxation, with labor questions and so on. These are matters in which large numbers of people have a direct pecuniary interest and when an interest of that sort is adversely affected there is bound to be an uproar. It is not surprising, therefore, that some of the court's more recent decisions have been unpopular.

Popular  
errors con-  
cerning  
the work  
of the  
Supreme  
Court.

Arising out of this unpopularity there have been proposals to limit the powers of the Supreme Court, especially in the matter of declaring laws unconstitutional. There is a common impression that the court invalidates a great many acts of Congress (one of them every few days), but this impression is wholly unfounded. In the whole history of the Supreme Court it has held only fifty federal laws unconstitutional—an average of one law every two or three years. Yet Congress passes many hundreds of laws at every session. There is also a common impression that the Supreme Court very often rejects a federal law by a five to four vote—five justices holding the law unconstitutional while the other four believe it to be valid. In this way, it is often said, a single justice who holds his office for life and is not responsible to the people may set aside the action of

<sup>1</sup> *Ex parte Merryman*, Taney's Reports, 246 (1861).

<sup>2</sup> *Texas v. White*, 7 Wallace, 700 (1868).



Congress and the President, both of whom are the people's representatives.

There are two answers to this criticism. In the first place very few laws of Congress have been declared unconstitutional by a close vote of the justices. There have been only nine such cases in one hundred and thirty-five years. In the second place no statute of Congress has ever been declared unconstitutional by the action of a single judge. No "one man decision" has ever been made by the court. To make a majority decision it takes one man plus four others. It is true, no doubt, that the decision could not be made without the vote of the fifth judge. But neither could it be made without the votes of the four others.

What are the facts?

Why should the turning of the scale by a single vote be so much more objectionable in the Supreme Court than it is in all other branches of the government? In the Senate when there is a tie, the presiding officer casts the deciding vote. Many important laws have thus been enacted. Were they "one-man laws"? Were they enacted by the vote of a single man? The same is true of the House of Representatives. That body has frequently passed important legislation by a bare majority of one; that is, by the deciding vote of the Speaker. Was this "one-man legislation"? In 1876-1877, Rutherford B. Hayes was elected President of the United States by a bare majority of one in the electoral college. Was he a "one-man President"? Was he elected President by the vote of a single man? If so, we should like to know what one man's vote elected him, or could have elected him, without the votes of the other 184 Republican electors.

The "one man" contention

The same principle goes further. It is fundamental. If the polling in a congressional district is so close as to elect a representative to Congress by a bare majority of one, must he then decline to accept the office on the ground that he does not want to be a "one-man representative," elected by the vote of a single man? No congressman, so elected, would think of doing anything of the sort. On the contrary, he would fight in the courts and in the House for recognition of the fact that election by a majority of one is just as legal, just as valid, as election by a majority of a thousand.

Various plans for limiting the authority of the Court have been put forward. It has been suggested that a two-thirds vote

Proposals  
to limit  
the Court's  
power.

or even a unanimous vote of the justices should be necessary to declare a law unconstitutional. But this would hardly accomplish the end in view. Some one judge, in either case, would occasionally hold the balance. One judge would determine from time to time whether the necessary two-thirds or the necessary unanimity could be had. Fewer laws would be declared unconstitutional perhaps; but close decisions would continue to be given. Another suggestion is that whenever the Supreme Court declares a law unconstitutional the law should then be sent back to Congress, where, if reënacted, it would become valid in spite of the court's decision. The objection to this plan is that it would virtually make Congress the final judge of its own acts. It would permit Congress to violate the provisions of the constitution whenever it made up its mind to do so. The will of Congress in America, like the will of parliament in England, would be supreme. Congress would not need to propose any changes in the constitution; it would gain the same end by merely passing an unconstitutional law a second time. Nothing would stand in its way. The will of Congress would be the constitution of the United States. It could abolish freedom of speech, freedom of the press, freedom of worship, trial by jury, and all the other safeguards. By a two-thirds vote it could even take away the President's powers.

The  
vital  
question.

The question is, therefore: Are we ready to accept the judgment of Congress on all questions affecting the relations of the nation to the states, the powers of public officials, and the rights of the individual? Do we regard Congress as a body of such wisdom and fairness as to warrant our making its will supreme—not merely over the Supreme Court, but over the constitution also? Do we desire, in effect, to abolish the present national constitution and to adopt a new constitution, which would consist of only a dozen words, as follows: "The reiterated action of Congress shall be the supreme law of the land"?

The student of American history, if he takes the trouble to look into the matter, will find that decisions which are unpopular in one generation are often highly praised by another. Some of the Supreme Court's earlier decisions were intensely unpopular when made, but to-day they are everywhere commended. When Chief Justice John Marshall, about a hundred years ago, delivered some of his notable decisions he was bitterly

assailed from almost every quarter; but to-day we regard Marshall as the greatest of all American judges and one of the great jurists of all time. We put his bust in the hall of fame and spread his biography into three volumes.

Not a few great jurists have adorned the supreme bench of the United States during these thirteen decades of its history. Marshall, of course, was the primate of them all; his generation knew not his equal anywhere. In the court's earlier years it numbered among its justices several of the "Fathers" themselves, John Rutledge, James Wilson, Oliver Ellsworth, John Blair, and William Paterson. Later, during the first half of the nineteenth century, Joseph Story served his long term of thirty-four years (1811-1845). Story may rightly be regarded as the classic expounder of the constitution; and his elaborate commentaries on it have not ceased to hold the admiration of legal scholars at the present day.<sup>1</sup> Next to Marshall, moreover, Story had the largest influence in shaping that notable series of Supreme Court decisions which reared the structure of American constitutional law. When Marshall and Story were together they formed a great team. Others whose names stand out conspicuously on the roll of the justices are Stephen J. Field, John M. Harlan, Horace Gray, and Oliver Wendell Holmes,—all of them men of great legal erudition and with a gift for clarity in expression. It is a great art to write decisions which combine law, logic, and literature.

Some  
eminent  
associate  
justices.

Joseph  
Story.

The work of the Supreme Court is far more difficult, and far more exacting, than the average citizen imagines. To him it is merely a matter of reading the constitution and applying it. But the constitution is not a set of verbal formulas which, when once interpreted, bear that interpretation for all time. The application of its clauses is not to be understood by taking the words in one hand and a dictionary in the other. Every provision must be construed as an organic, living thing, hence it may have one meaning to-day and quite another meaning a generation hence. If the constitution were a dead affair, as some laymen imagine, it would have been buried and forgotten long ago.

This does not mean, of course, that changes of interpretation

<sup>1</sup> *Commentaries on the Constitution of the United States*, in two volumes. There have been many editions.

The doctrine of *stare decisis*.

It is not always followed.

Inadvisability of following it too strictly.

The subordinate federal courts.

are made frequently. When the Supreme Court has once made a ruling of law in any case actually before it, such ruling becomes a precedent and will generally be adhered to in future cases of the same nature. This is known as the principle of *stare decisis*. The court has not often altered any constitutional stand taken by it, although there have been a few notable cases of such reversal. For instance it decided in 1880 that an income tax might be levied by Congress without apportionment among the states, but fourteen years later it ruled that such taxes must be apportioned.<sup>1</sup> On one occasion the court decided that Congress might not pass a law making paper money a legal tender in payment of debts incurred before the passage of such legislation.<sup>2</sup> A year later it reversed this decision and held that Congress did have power to take such action.<sup>3</sup> More commonly, however, the court finds it possible to modify a prior decision by some means other than a frank reversal. No two cases are exactly alike, when they come up for trial; a later case can usually be distinguished in some particular from an earlier, thus affording an opportunity for giving a different decision.

The right to reverse its decision on questions of constitutional law, whenever occasion to do so arises, is one of the things which enables the Supreme Court to endow the constitution with dynamic quality. In cases strictly affecting private intercourse it is essential that the rules of law be not subject to frequent and capricious change. That is why the doctrine of *stare decisis* was evolved by lawyers and courts. But where issues of public policy are concerned the rigid application of that doctrine would tend to slow up the machinery of political and social progress. In the administration of the law, as in other fields of human activity, the reverence for precedents, which too often merely embalm the prejudice of a past generation, may easily be carried to an absurdity.

So much for the organization and work of the highest tribunal. Let us turn now to the subordinate federal courts. By the Judiciary Act of 1789 which organized the Supreme Court a system of subordinate federal courts was also created, consist-

<sup>1</sup> See *above*, p. 270.

<sup>2</sup> *Hepburn v. Griswold*, 8 Wallace, 603.

<sup>3</sup> *Knox v. Lee*, 12 Wallace, 457.



ing of circuit and district courts. This act was at various times amended, and the original scheme underwent many important changes during the next century until the judicial legislation became extremely complicated. In 1911, accordingly, the whole legislation was revamped by Congress in the so-called Judicial Code which went into operation on January 1, 1912. This code is now the groundwork of the entire system of federal courts subordinate to the Supreme Court.

Next below the Supreme Court comes the circuit court of appeals. The territory of the United States is divided into nine circuits, each circuit containing three or more states. There is a circuit court of appeals for each of these nine circuits, such courts having from two to four judges according to the amount of business to be done. In addition, one justice of the Supreme Court is assigned to each circuit, but as a matter of fact, these justices do not go on the circuits at all, their whole time being taken up at Washington. The circuit court of appeals in each circuit holds sessions at various cities, hearing appeals from the district courts below. In many cases, where no issue relating to the constitutionality of a law is raised, the circuit court of appeals has final authority. But when this issue is raised, as it is in a multitude of cases, an appeal may be carried to the Supreme Court.

The  
circuit  
court of  
appeals.

Then come the federal district courts. The entire territory of the United States is divided into eighty-one districts, each state constituting at least one district and the more populous states having two districts or even more within their boundaries. New York State is divided into four districts. Each district court has its own judge as a rule; but in a few cases one judge serves two districts and a few districts have more than one judge. Every district court holds several sessions each year, sometimes sitting in more than one city within the district. It is a court of first instance, and the only federal court in which a jury is used. Every district also has its United States attorney and United States marshal, appointed by the President with the concurrence of the Senate. The function of the district attorney is to act as the representative of the nation in prosecutions before the court. The marshal executes the court's orders and judgments, attends to the services of its writs, and is its general executive officer. Both are under the direction of the federal

The  
district  
courts.

department of justice. Each district court also has a federal commissioner who conducts the preliminary hearing in criminal cases and decides whether an accused shall be held for the grand jury. Most cases under federal jurisdiction are entered in the district courts and the great majority of them are finally disposed of there, only a small percentage going thence to the circuit court of appeals and a still smaller proportion to the Supreme Court. There is a common impression that the federal district courts may hear appeals from the highest state courts; but this impression is altogether erroneous. The federal district courts hear no appeals whatsoever; their jurisdiction is wholly confined to cases coming up in the first instance.

The  
court of  
claims.

A word should also be said about the two special courts.<sup>1</sup> The court of claims, established in 1855, consists of a chief justice and four associate judges appointed by the President. Its business is to hear and determine the merits of all claims against the federal government, such as claims arising out of contracts. With certain restrictions there is a right of appeal to the Supreme Court. The other special court, the court of customs appeals, is a recent creation, dating only from 1909. It has the same number of judges as the court of claims and they are similarly appointed. Its function is to serve as a final court of appeals in all controversies regarding the administration of the tariff laws, as, for example, controversies over the appraised valuation of goods or the proper rate of duty.

The  
court of  
customs  
appeals.

Protec-  
tions  
for the  
independ-  
ence  
of the  
federal  
courts.

In all the federal courts the judges are appointed for life or during good behavior. They are removable only by impeachment before the Senate of the United States. Their salaries may not be diminished during their tenure of office. The rule covering these matters cannot be paraphrased into any clearer or more concise language than that of the constitution itself: "The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." But this does not mean that Congress has no control over the courts. It can at any time

<sup>1</sup>The courts of the District of Columbia, of Hawaii, Alaska, Porto Rico, and the Philippines are also federal courts. Their judges and other officers are appointed by the President with the consent of the Senate, and their jurisdiction is assigned to them by Congress.

reorganize, or even abolish, any of the federal courts except the Supreme Court. It can change their jurisdiction and regulate their procedure. There is no way in which the judges can get their salaries except by a congressional appropriation. The federal courts are not independent in the sense that the people, through their representatives, have no control over them.

A quarter of a century ago I was listening to the discussion of an interesting case in a law school classroom. The decision in this particular case appeared to be in accord with the plain intent of the law, but it was obviously unjust to one of the suitors. "That may be good law," suggested one of the students, "but it isn't justice!" "Quite true," replied the professor, "but if it's justice you want to study, go over to the divinity school; it's *law* we're studying here." This reply amused the class, of course; but the student was merely making the sort of comment that most laymen would have made under the circumstances. We speak of all our courts as courts of justice, and it is justice that the average layman expects the courts to administer. He forgets that what judges are sworn to administer is *the law*.

Law  
and  
justice.

Now the law may be just or unjust, and if it be an unjust law no court can wring justice out of it. It is the legislatures that are responsible for most of the injustice which arouses the laymen's ire. The voter sends bull-witted men to represent him in Congress, or in the state legislature; they enact some ill-advised statute; the courts (as is their duty) apply this statute in accordance with its plain intent and meaning; the result is a hue and cry from the very people who elected the legislators. They blame the courts, when the blame belongs to themselves.<sup>1</sup>

<sup>1</sup>The standard work on the Supreme Court is Charles Warren's study of the great tribunal (3 vols., New York, 1922), but there is also much good material in Albert J. Beveridge's life of *John Marshall* (3 vols., N. Y., 1919-1922).

## CHAPTER XXVII

### THE GOVERNMENT OF THE TERRITORIES

It was Napoleon who, by selling Louisiana to the United States, made it possible for the Union to develop into the gigantic power that we see.—  
*Sir J. R. Seeley.*

The United States as a colonizing power.

It is not customary to think of the United States as a colonizing country, yet the whole history of the nation has been one of steady territorial expansion. The area of the original thirteen states forms less than one-tenth of the territory which is under the flag of the United States to-day. No other nation has relatively increased its territory to so great an extent and colonized its acquisitions so largely with its own people.

The two periods of expansion :  
1. within the present boundaries.

The history of American expansion may be divided into two periods. First there is the era extending from the close of the Revolutionary War to the year 1867. It was during this interval that the United States acquired by successive treaties all the land included in the Northwest Territory <sup>1</sup> as it was then called, together with the Louisiana Purchase, and Florida. During this interval also, the nation secured by conquest from Mexico, and by the admission of territories which had declared their independence of Mexico, the enormous areas of Texas, the Southwest, and the South Pacific slope. All this territory was contiguous; it included nothing remote from lands already possessed, and its acquisition did not impair the compactness of American territory. All of it, moreover, could be parcelled into states of the Union with full rights of statehood. The expansions of this period merely represented the logical rounding-out of national boundaries.

2. outside territories and insular possessions.

The second period, extending from 1867 to the present time, has been marked by territorial acquisitions of a different sort.

<sup>1</sup> The Northwest Territory was acquired by the Treaty of 1783 and before the adoption of the constitution was governed by the provisions of the famous Northwest Ordinance which was framed in 1787 by the Congress of the Confederation. In 1789, on the establishment of the new national government, the provisions of this ordinance were reënacted into law by Congress.



By the purchase of Alaska from Russia in 1867 the United States acquired its first non-contiguous possession. This precedent was not followed, however, by any further ventures into distant territories until 1898, when the Philippines, Porto Rico, and Guam were acquired; and in the same year Hawaii was annexed at the request of its own government. In 1900 a treaty with Great Britain and Germany gave to the United States certain islands in the Samoan Archipelago, and in 1904 the Panama Canal Zone came virtually into American hands by a treaty made with the new Republic of Panama. Finally, in 1917, the Danish West Indies were acquired by purchase.

All these acquisitions differed from those of the preceding period in that they are separated from the main territory of the United States and cannot well be assured of admission to statehood at a future date. They are colonies in the usual sense of the word, although they are designated in official parlance as insular possessions. Since 1898, therefore, the United States has faced the practical certainty that its jurisdiction will include two classes of territory; one constituting the United States proper with its people enjoying full constitutional rights and privileges, the other made up of distant possessions which cannot be dealt with on that basis.<sup>1</sup> In other words the United States has a colonial empire on its hands, and a lot of colonial problems. We may avoid using these terms but that does not alter the facts.

Differences  
between  
the two  
forms of  
expansion.

The makers of the constitution foresaw that the Union would eventually comprise more than the thirteen original states. Hence they made provision that new states might be admitted by Congress and that any territory belonging to the United States, if not admitted to statehood, should be governed in such way as Congress might decide. The constitution did not, however, in express terms bestow on Congress the right to acquire new territory, and in connection with the Louisiana Purchase of 1803 it was urged that Congress had no such right. The Supreme Court in 1810, however, settled this question by deciding that the United States, as a nation, has the same right to acquire territory as any other nation.<sup>2</sup>

The constitutional  
basis of  
expansion.

<sup>1</sup> It is hardly conceivable, for example, that the Panama Canal Zone and the Virgin Islands will ever be admitted as states of the Union.

<sup>2</sup> *Sere v. Pitot*, 6 Cranch, 332.

Constitutional questions connected with outlying possessions.

But granting the right of the United States to acquire territory, many other questions arose to be settled. Is the control of Congress over such territory complete and unrestricted, or is Congress bound there by all the limitations of the national constitution? Have the inhabitants of territories the same constitutional rights as citizens of the states, the right to keep and bear arms, and the right to trial by jury? Is a Filipino or a Porto Rican entitled to these rights by the mere fact that the American flag flies over his islands? And what about the operation of such laws as Congress may make? Do they apply, *ex proprio motu*, to these territories or only when their extension is expressly provided for? Does a tariff law, for example, apply only to merchandise which comes into the United States proper, or to all goods entering the insular possessions as well? All these questions have come before the Supreme Court at one time or another and all have been answered by that tribunal, so that the constitutional status of territories and insular possessions is now fully settled.

The rules as enunciated by the Supreme Court.

Summarizing the main features in this chain of judicial decisions one may lay down the following general rules: The power of Congress over the outlying territories of the United States is practically complete. The inhabitants of the insular possessions are not citizens of the United States unless and until Congress expressly extends citizenship to them. The provisions of the federal constitution relating to the rights of citizens (for example the right of trial by jury) do not extend to the inhabitants of these territories unless and until Congress so provides. The court set up a distinction between "incorporated" territory, on the one hand, that is, territory which had been incorporated into the United States, and "unincorporated" territory.<sup>1</sup> As respects the first class, Congress is subject to all the applicable limitations of the constitution; as respects the second class Congress is not so restricted, but is bound only by those "fundamental" provisions of the constitution which automatically extend to all American soil. The Supreme Court did not explain, however, just what provisions are fundamental but left this to be determined in particular cases as they might arise. As respects tariff laws it has held that the provision as to uniformity

<sup>1</sup> Somewhat curiously, it included Alaska among the "incorporated" territories.

of taxation is not among the fundamental ones and hence that Congress may provide a special rate of duty on goods coming into the insular possessions or from there into the United States.

By act of Congress the Porto Ricans have been made full citizens of the United States. But the Filipinos have not yet been granted that status. They are, of course, no longer subjects of Spain, nor are they full citizens of the United States. What are they? They are called "nationals" of the United States. This means that they are entitled to the protection of the United States government and to its assistance in all international matters. So far as international law is concerned they are, to all intents, American citizens. But by constitutional law, the law of the United States itself, they are not citizens, and are not entitled to the privileges and immunities of citizens save insofar as Congress may grant such rights to them. As a matter of fact they have been granted most of the constitutional rights which American citizens possess.

Status of  
Porto  
Ricans  
and  
Filipinos.

Owing to a diversity in local conditions among the various possessions of the United States, no attempt has ever been made to establish a uniform scheme of government for all of them. Each is somewhat differently organized from the others. Alaska is an "incorporated" territory and all laws passed by Congress apply to Alaska as to the United States proper. Alaska has a governor appointed by the President of the United States and a territorial legislature. This legislature is made up of two chambers, and the members of both are elected by the people. It has the usual lawmaking powers, but its acts must not be "inconsistent with the constitution and the laws of the United States." The governor has a veto power similar to that of the President. Alaska is represented in Congress by a delegate who may speak there but has no vote.

Present  
government of  
American  
dependencies:

Alaska.

Hawaii is also a territory, but comes in the "unincorporated" class. Prior to 1893 the Hawaiian Islands had a monarchical form of government with a native dynasty, but in that year a revolution abolished the monarchy and set up a provisional government which, in turn, gave way to a republic. Then the government of the Hawaiian republic applied for and obtained annexation to the United States. The territorial governor of Hawaii is appointed by the President of the United States. He is assisted in executive work by various administrative officials,

Hawaii.

a secretary, treasurer, attorney-general, and so on. All of these, with the exception of the secretary, are appointed by the territorial governor with the concurrence of the Hawaiian senate. Subject to the general control of Congress the Hawaiian legislature, consisting of two elective chambers (a Senate and a House of Representatives), makes the laws, determines the taxes, and provides for the annual expenditures. The governor possesses the usual right of veto, which may be overridden by a two-thirds vote of both Houses. There is, moreover, an important provision "that in case the legislature fails to pass appropriation bills providing for payment of the necessary current expenses of carrying on the government and meeting its obligations as the same are provided for by the then-existing laws, the governor shall, upon the adjournment of the legislature, call it in an extra session for the consideration of appropriation bills and until it shall have acted the treasurer may with the advice of the governor make such payments, for which purpose the sums appropriated in the last appropriation bills shall be deemed to have been reappropriated." In other words, the territorial legislature cannot use its control of expenditures in such way as to coerce the executive into submission by stopping the wheels of government. Hawaii also has its own territorial courts, likewise a federal district court. The voters elect one delegate to the House of Representatives at Washington, but he has no vote. All elections in Hawaii are by universal suffrage, but with one important reservation, namely, that voters must be able to "speak, read and write the English or the Hawaiian language." This shuts out most of the Japanese and Chinese.

Porto  
Rico.

During the war with Spain the American army occupied Porto Rico and in the two years following the withdrawal of the Spanish forces the island continued under military government. People do not always realize how easy it is for an army to provide, out of its own resources, all the administrative machinery that is necessary for temporarily governing a conquered territory. The commander-in-chief with his staff transform themselves into a governor and council; the engineer corps provides a department of public works; the paymaster's department takes charge of the finances; the medical and sanitary corps become a department of public health; the judge-advocate sets up a judicial system; the military police take over the work of



policing, and so on. To say that Porto Rico was for two years under military rule does not mean, therefore, that the affairs of the island were crudely or arbitrarily handled. Quite the contrary. The system of military rule did not give way to an organized civil government because it was found to be inefficient but because of the general aversion of the American people to continued military government in any portion of their territory.

The present frame of Porto Rican government has its basis in the Foraker Act of 1900, considerably modified by the organic statute of 1917, commonly known as the Jones Act. At the head of the island administration is a governor, appointed by the President with the consent of the Senate. He holds office during the President's pleasure. The governor is assisted by six heads of executive departments, of whom two (the attorney-general and the commissioner of education) are appointed by the President, while the remaining four (treasurer, commissioner of the interior, commissioner of health, and commissioner of agriculture and labor) are appointed by the governor. These six heads of departments form an executive council, assisting the governor in an advisory capacity.

Present  
government  
of the  
island:

1. The  
executive.

The Porto Rican legislature consists of two chambers, a Senate and a House of Representatives. The Senate contains nineteen members, of whom two are elected from each of seven senatorial districts and five are elected by the voters of the island at large. The House of Representatives is composed of thirty-nine members, one from each of thirty-five districts and four elected at large. Porto Rico has universal suffrage but with a literacy test for voting.

2. The  
legislature.

The legislature may levy taxes (except taxes on exports) and may authorize borrowing on the credit of the island. It also determines the expenditures, but if the two chambers do not agree on appropriations for the support of the island government, the sums voted for the preceding year are deemed to have been reappropriated. The provision relating to the governor's veto power is a peculiar one. The governor may veto an act of the Porto Rican legislature; then if the legislature reenacts it by a two-thirds vote the measure goes to Washington where it is laid before the President. If the President does not disapprove it within ninety days it becomes effective. Every measure, after it has been enacted, must also be reported to Washing-

Its  
powers.

ton, where Congress has power to annul it. As a matter of fact, Congress does not interfere.<sup>1</sup>

### 3. The courts.

Porto Rico has its own system of courts, both federal and territorial. The judges of the former are appointed by the President, those of the latter by the governor of the island and the Porto Rican Senate,—with the exception of the territorial supreme court, in which the five justices are also appointed by the President.

### The Philip- pines.

By the treaty with Spain in 1898 the Philippine Islands were ceded to the United States. Military rule continued for nearly three years. During this interval a commission was sent to the island to study conditions and report upon a system of civil government for the islands. It was not until 1901, therefore, that Congress took any action in the matter of a scheme of civil government for the Philippines. The President, meanwhile, controlled the administration of the islands by virtue of his powers as commander-in-chief of the army. To remove any possible doubts as to the legality of this situation, Congress gave the President "all the military, civil and judicial powers necessary to govern the Philippines . . . until otherwise provided." In accordance with this authority the President appointed a civil governor and provided the islands with an appointive legislative body or commission made up of both Americans and Filipinos.

### The Law of 1902.

This temporary civil government functioned for about a year, that is, until Congress was able to prepare and enact an organic law for the islands, which it did in 1902. The chief provisions of this law were as follows: The executive power was to be vested in a governor-general, appointed by the President with the consent of the Senate, and in heads of administrative departments, similarly appointed. These administrative officials, along with four other appointive members, were to constitute the Philippine commission, which was to serve as the sole legislative body until conditions should warrant the election of an assembly; thereafter it was to function as the upper chamber of the legislature. The conditions were fulfilled, and the first Philippine assembly met in 1907.

Thus matters continued until 1916 when the Jones Act made

<sup>1</sup> One delegate from Porto Rico, elected by popular vote, has the right to sit in the House of Representatives at Washington, but has no vote in that body.

three important changes in the government of the islands. It gave a larger degree of self-government, increased the powers of the governor-general, and replaced the Philippine commission by an elective Senate. So the present system of insular government may be outlined as follows: Executive power is exercised by a governor-general who is appointed by the President with the concurrence of the U. S. Senate. This appointment is not made for any definite terms of years. There is also a vice-governor, similarly appointed, who serves as head of the department of public instruction. The heads of the other administrative departments are appointed by the governor-general with the approval of the Philippine Senate. The authority of the governor-general extends, in a supervisory way, over all these departments. In addition he prepares the annual budget, which he lays before the Philippine legislature for its approval. And if the legislature does not make the necessary appropriations, those of the previous year are deemed to have been re-appropriated. The governor-general may also veto any action of the legislature and if the latter overrides this veto by a two-thirds vote the issue is then referred to Washington where the President has six months in which to decide it.<sup>1</sup> The vice-governor and the other heads of departments, together with the presiding officers of the two legislative chambers, make up a governor-general's cabinet, or council of state as it is called; but this body has functions of an advisory character only and does not control the governor-general.

The Philippine legislature is made up of two chambers, a Senate and an Assembly. The Senate has twenty-four members, of whom twenty-two are chosen by the voters in eleven senatorial districts, while the remaining two are named by the governor-general to represent the non-Christian provinces. The senatorial term is six years. The Assembly has ninety members, of whom eighty-one are elected by single-member districts for a three-year term and nine are appointed. These two chambers, acting in concurrence, have the usual powers of a territorial legislature, subject to the executive veto as explained in the preceding paragraph.

<sup>1</sup>Two commissioners or delegates are elected by the voters of the Philippines to sit (but not to vote) in the House of Representatives at Washington. They also confer with the President on Philippine questions when necessary.

The  
Jones  
Act  
(1916).

Present  
govern-  
ment  
of the  
islands:

1. The  
executive.

2. The  
legislature.

The suffrage extends to all "nationals of the United States" over twenty-one years of age who have resided in the Philippines for one year or more, provided they can read and write either English, Spanish or a native language, or, in the case of illiterates, provided they own a certain amount of property or pay a certain amount of taxes. All who had the right to vote, and had actually voted, prior to 1916 are given the suffrage even if unable to fulfil the foregoing requirements. The suffrage is the same for both Senate and Assembly elections.

### 3. The courts.

The judicial organization of the Philippines is much like that of Porto Rico save in one respect—there is no federal court. There are local courts, district courts (or courts of the first instance), and a supreme court for the islands. Under certain conditions appeals may be taken from the decisions of this last-named court to the Supreme Court of the United States. Cases which would come up in the federal court, if there were one, go to the Philippine district courts, or courts of first instance. Judges of the local and district courts are appointed by the governor-general with the consent of the Philippine Senate; those of the supreme court by the President. Most of the old jurisprudence of the Spanish period remains substantially unchanged; but Spanish procedure in both civil and criminal trials has been abolished.

### The provincial governments.

A system of local government has also been established in the islands. There are thirty-one "regular" provinces, each with a provincial governor and certain administrative officials assisting him. The provincial governor is elected every two years by direct vote of all those persons qualified to exercise the suffrage within the province; the administrative officials are selected under civil service regulations and appointed by the governor-general. The governor and two elective councillors form a provincial board. The functions of the provincial governments are to look after the collection of taxes, to care for main roads, and to supervise the work of the municipal authorities. The taxes, after they are collected, go in part to the island treasury, in part to the municipalities, and in part to the province; but the province is the chief unit for collecting them. Seven other non-Christian provinces are entirely under the control of the Philippine Government and have no local government of their own.

Of municipalities there are several hundreds, large and small.



Manila, the capital, is governed by a mayor and a municipal board. The mayor is appointed by the governor-general with the consent of the Philippine Senate, and holds office for three years unless sooner removed. The municipal board has ten members who are elected by popular vote. Each year the members of the board elect from among their own number a president who presides over their deliberations. This municipal board enacts the local ordinances, and controls the various administrative departments such as public works, police, health, and schools; it also determines the general course of municipal enterprises. Apart from Manila all the municipalities are grouped into four classes according to their size. Each has an elective municipal government which includes a municipal council of from eight to eighteen members. These local governments, however, are under strict provincial control.

Municipal government.

Manila.

The smaller municipalities.

The Jones Act of 1916 asserted the intention of the United States to recognize the independence of the Philippines as soon as a stable government could be established. And during the next five years the Washington authorities gave the Philippine legislature an almost free hand. Mr. Francis B. Harrison, the governor-general who served during this period, reported that the islands were fit for independence. But President Harding, in 1921, thought it well to have the question looked into by a special commission of two members. This commission, after investigation, reported adversely and so the matter stands.<sup>1</sup> There is a difference of opinion as to whether the Philippine people are ready for self-government and as to whether a majority of them desire it. The leaders, the politicians, undoubtedly do, but the real sentiment of the people is not so certain. The Philippine legislature has grown more insistent in its demand for independence and has declined to work in full harmony with the governor-general, although it has been made clear that the latter is fully supported by the administration at Washington. There is little, if any, likelihood that much harmonious coöperation of the executive and legislative branches of the Philippine government can be secured under the present system. On many occasions the plan of an independent, appointive executive has

The issue of independence.

Present status of the question

<sup>1</sup>This special commission was made up of Major General Leonard Wood and the Hon. W. Cameron Forbes, a former governor-general. Their report was printed as a public document.

been tried in colonial administration, and it has always failed. An elective legislature will not rest content with the making of laws, while an appointive governor, responsible neither to the legislature nor to the people, controls the administration.

The issue is not one of principle but of expediency. There is no serious disagreement among the people of the United States on the proposition that the islands should have all the self-determination they are capable of exercising properly. The promise of independence was made by Congress in good faith, and it will be redeemed. But it was not an unconditional promise. It merely established a goal toward which American policy should move as rapidly as practicable. The United States has never been, and is not now, under any pledge to grant independence to the Filipinos irrespective of their capacity to govern themselves without supervision. So the whole issue resolves itself into a question of fact, and such questions are not easily settled by argument. The Wood-Forbes Report presented a good deal of evidence that the Filipinos, insofar as they had been given a free hand in various governmental affairs during the years 1916-1921, did not display any too much political capacity, honesty, or good sense.

Now it may be a surprise to some ardent Americans to know that the people of the Philippines, after all that the United States has done for them during the past twenty-five years, should feel so desirous of parting company with their benefactors. The American taxpayer has spent a great many millions in the Philippines on education, public works, and the promotion of economic prosperity. The Filipinos are immeasurably better off than they were under Spanish domination. The islands are a source of expense to the United States; from a military standpoint they are also a source of weakness. We have nothing to gain by keeping them and a good deal to gain by setting them adrift. The Filipino realizes all this, of course; but it does not alter his desire to control his own government. For it is an almost universal rule that people of all races prefer government of their own manufacture, even though it be misgovernment, as against any form of outside control, however beneficent and enlightened it may be.

Conclusion.

The position of the United States in the Philippines is that of a trustee. The islands are held in trust for their own people.

This trust, like all trusts, must some day terminate; but it would bring no good to anyone if it should be terminated prematurely. "We are not guardians for the educated politicians," said Chief Justice Taft some years ago; "we are charged with protecting the rights of the ignorant and uneducated who do not know their rights. . . . We can't let go now, and the sooner we realize it the better. . . . We can go physically out of the islands, of course, but the conditions there which would ensue upon our departure would carry us back."

Of the other outlying American possessions there is little that needs to be said. In Samoa and Guam all governmental authority is vested in the hands of a commandant designated by the Secretary of the Navy. The commandant appoints a governor for each of the districts into which the American islands are divided. Local government is left to the natives. In the Panama Canal Zone, that strip of territory across the isthmus about ten miles in width, of which the United States acquired in 1904 from the Republic of Panama "the perpetual use, occupation and control," the administration is in the hands of a governor appointed by the President with the Senate's approval. The newly-acquired Danish West Indies or Virgin Islands are administered by a governor appointed in the same way. Cuba is not in any sense a possession of the United States, although it is virtually under American protection in international affairs.

Samoa  
and Guam.

The  
Panama  
Canal  
Zone.

The  
Virgin  
Islands.

The District of Columbia occupies a somewhat anomalous position in the governmental system of the United States.<sup>1</sup> It is neither a state nor a territory, but by virtue of its being the national capital it is directly under the control of the federal government. From the beginning of the Revolutionary War to the formation of the constitution, Philadelphia served as the continental headquarters save for a short period in 1783 when the Congress of the Confederation was driven from its meeting place by a band of Revolutionary soldiers clamoring for their pay. Sessions for a few weeks were then held at Princeton. This incident carried its lesson, however, to the members of the constitutional convention in 1787. While they were not ready to designate any city as the permanent seat of the new national government, lest by so doing they should create sectional jealousy and perhaps lead to the rejection of the whole consti-

The  
District  
of  
Columbia.

Early  
vicissit-  
tudes  
of the  
federal  
capital.

<sup>1</sup>Article i, Section 8.

tution, they did make provision for the eventual selection of a capital which would be exempt from the jurisdiction of any state.

What the  
constitution  
provides.

At Madison's suggestion, accordingly, the constitution was worded to provide that Congress should have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of government of the United States." The selection of the exact place was left for the future, but with the stipulation, as indicated above, that the territory acquired for the new capital should be wholly under the control of Congress.

Choice  
of the  
Potomac  
location.

When the first Congress of the United States met in 1788-1789, after the adoption of the constitution, there was a long and bitter struggle on this question, particularly between representatives of the northern and the southern states. Each wanted the capital located in its own region. In the end it was agreed to accept a location on the Potomac, which was in reality a victory for the South. The selection was the result of a deal between the sectional leaders and was connected with the proposition to have the new national government assume the debts which the several states had accumulated during the struggle for independence. At any rate, the District of Columbia became federal territory and the seat of government was moved there in 1800.

For a time the District was permitted to have its own system of local government, with officials elected by the inhabitants, but there was so much extravagance and inefficiency that Congress ultimately decided to intervene, which it did with a drastic hand in 1874. It abolished local self-government within the District and provided that the area should be administered by an appointive commission.

Present  
adminis-  
tration.

The administration of the District of Columbia is vested, therefore, in a board of three commissioners. Two of them are appointed by the President, with the consent of the Senate, from among the residents of the district. They hold office for a four-year term and one must be chosen from each of the two leading political parties. The third commissioner is detailed by the President from the engineer corps of the United States army. He must be an officer with the rank of captain or higher rank,

The com-  
missioners.



but is not detailed for any definite term. Subordinate officers of the engineer corps are assigned to assist him.

These three commissioners of the District of Columbia, as a body, have large powers. They make all municipal appointments, supervise the local public services such as streets, water supply, policing, fire protection, schools, and charities; and have power to make the ordinances or regulations relating to the protection of life, health, and property. Each member of the commission takes immediate charge of certain departments; for example, the engineer member has charge of streets, water supply, sewerage, parks, and lighting. In a word they exercise the functions which in many cities of the United States are given to the mayor, the heads of municipal departments, and the city council.

Their powers.

The laws applying to the District of Columbia are practically all made by Congress, although usually on the commission's recommendation. So also are the appropriations for carrying on the government of the district. The commissioners each year make their estimate of what is required and submit it to a congressional committee. After this committee has considered the estimates, and changed them as it sees fit, an appropriation act embodying them is passed by Congress. Half the annual cost of governing the district, as thus appropriated, is paid from the national treasury; the other half is levied upon the district by taxation. A very great amount of property in the district belongs to the national government and is exempt from taxation. That is why the national treasury bears part of the cost.

The laws and the appropriations, how made.

The inhabitants of the District of Columbia are entirely disfranchised. They have no vote for President, since the district is not entitled to any presidential electors. They have no senators, no representatives in Congress, no mayor, aldermen, or councillors. The only way in which any inhabitant of the District of Columbia ever manages to cast a ballot is by being a "legal resident" of some other place. That is the way many of them arrange it. When men are appointed to federal positions which involve their living in Washington they often retain their legal residences in the states from which they come, and go back to these states to cast their votes on election day. But there are many thousands who are born in Washington and live there who have no such opportunity. They pay taxes regularly but they have no representation either in the national government or in

Absence of local autonomy.

The anomaly of the situation.

the management of their own local affairs. The government of the District of Columbia affords the most glaring example of taxation without representation that exists in any democracy. No sophistry can explain that simple fact away.

Efficiency  
of the  
district's  
govern-  
ment.

But as a practical matter the people of the district are far better off than they would be if Congress allowed them to elect all their local officers and to pay all their own expenses. They have one of the most efficiently and most economically governed cities in the world. Its administration has been free for more than forty years from scandal and corruption. Local self-government would more than double the rate of taxation and the people of the district would unquestionably get less for their increased taxes than they do under the present system.<sup>1</sup>

The selection of Washington as the site of the national capital was a mistake. The site has no great natural advantages. It is far away from the country's geographical center and also from the center of population. It is off the main paths of travel. Yet the city was admirably planned before a single building was erected and although it took a long time to become much more than a straggling town, there are now few who will now deny it a place among capitals of the first rank.

<sup>1</sup>The best book on this subject is W. F. Dodd, *The Government of the District of Columbia* (Washington, 1909).

## CHAPTER XXVIII

### THE PLACE OF THE STATES IN THE NATION

The people of the United States constitute one nation, under one government. On the other hand the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence.—*Salmon P. Chase.*

There are two sorts of republics, national and federal. A national republic is one in which the smaller communities are merely administrative subdivisions of the whole, and possess only such powers as are delegated to them. France, for example, is a national republic. A federal republic, on the other hand, is an aggregation of states, commonwealths, or other divisions, each of which possesses its own inherent powers. The United States is a republic made up of smaller republics, a federal republic, an indissoluble league of republican states. And a republic, as Madison defined it, "is a government which derives all its powers directly or indirectly from the great body of the people." The states of the Union are not, like the *departments* of the French republic, mere administrative divisions created for the more efficient carrying on of government. The American state has its own assured powers; within its own sphere it is supreme; and within broad limits it determines its own frame of government. Its powers are inherent, not delegated. It possesses these powers *ab initio* and does not receive them by grant from the federal constitution or from any other overhead source. There were states before there was a national constitution and they possessed the attributes of sovereignty. The preamble of the constitution begins with the words "We, the people of the United States," it is true; but turn to the last article of the document and you will find provision for the establishment of this constitution "between the states so ratifying the same." The fact is that the people as such had nothing directly to do either with its making or adoption. The states through delegates framed the constitution and through conventions ratified it.

A federal republic defined.

Place of the states in a federal republic.

Nature  
of the  
Union :  
federal  
in form ;  
national  
in powers.

But although the government of the United States is federal in form, it is national as respects the mode in which it exercises its powers. The national government in the United States acts directly upon the individual citizen. The nation claims its own citizens, and over them it exercises authority in its own right. This dual nature of the American republic has been the main-spring of much controversy, but the framers of the constitution knew exactly what they were doing and explained it fully at the time. Madison, in *The Federalist*, gave it a lucid exposition. "The proposed constitution," he wrote, "is in strictness neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the operation of its powers it is national, not federal; in the extent of them, again, it is federal, not national; and finally, in the authoritative mode of introducing amendments it is neither wholly federal nor wholly national."<sup>1</sup>

Madison's  
explanation.

What the  
states sur-  
rendered  
and why.

In the American scheme of government, then, the states are the original source of governmental powers. All powers now possessed by the national government have been delegated by the states at some time or other. By their adoption of the national constitution, the states parted with certain great powers, delegating them to a new national government in order "to form a more perfect union, to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty." The states, on establishing the national government, parted with various powers forever,—for example, the power to make treaties, to wage war, or to coin money. They parted forever with all the exclusive powers which the constitution gives to Congress and became subject to the limitations which the constitution places upon themselves.

The dele-  
gation of  
powers to  
the nation.

State government in the United States represents, therefore, the exercise of powers which have not been delegated. It covers a field originally unlimited but now greatly restricted. It was assumed by the framers of the constitution that this "residual" authority of the states would outweigh the "delegated" powers of the nation, but such has not proved to be the case. The elasticity of federal powers, as interpreted by the Supreme Court, has enabled the national government to assume functions which

<sup>1</sup> *The Federalist*, No. 39.



would have fallen within the residual field if a policy of strict construction had been consistently followed. Nevertheless the state is still the pivot around which the whole American political system revolves. Were it not for the states and their reserved powers the national government could not function; were it not for the work of the state governments a President could not be elected, nor could congressmen be chosen, for the states determine the voting qualifications, the states mark out the congressional districts, and the states provide all the machinery of elections. Neither would there be any county or city or town governments, for all of these derive their existence and their authority from state constitutions and state laws.

Failure  
of this  
residual  
idea.

Much ink and paper have been wasted in discussing whether the several states of the Union are "sovereign." Here, as in so many other political disputations, a great deal depends upon what you mean by the term that you are using. If sovereignty means the possession of absolutely unlimited political power, then no state of the Union is sovereign, for all of them are restricted in what they may do. If, on the other hand, you define sovereignty as the original and complete authority over things within its jurisdiction, then each state of the Union is sovereign. It is all a matter of definitions and terminology. The true situation was tersely set forth by Chief Justice Marshall a hundred years ago. "In America," he said, "the powers of sovereignty are divided between the government of the Union and those of the states. They are each sovereign with respect to the rights committed to it, and neither is sovereign with respect to the rights committed to the other."<sup>1</sup>

Are the  
states  
"sover-  
eign?"

Much of the confusion has resulted from the failure to distinguish sovereignty, as such, from the exercise of those governmental powers which one commonly associates with sovereignty. Political philosophers tell us, and they are quite right, that sovereignty is by nature indivisible for there cannot be two wills, each supreme, controlling the same field of jurisdiction. On the other hand the supreme will may find expression through various channels, legislative and executive, and in federal states

Reason for  
misunder-  
standings  
on this  
question.

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheaton, 316. Alexander Hamilton, in 1788, had expressed the same doctrine in somewhat different words. "The laws of the United States," he declared, "are supreme as to all their constitutional objects; the laws of the states are supreme in the same way. These supreme laws may act on different objects without clashing."

it may find expression through both central and local authorities. In the United States this is the case. There is a division of governmental powers between the nation and the several states, but no partition of sovereignty, no division of the supreme will. The supreme will is the will of the people. This will of the people is the sovereign in America. Its sovereignty is absolute and undivided. But the people as a whole cannot perform the actual work of government, and so they have parcelled this work to the nation and the states—making both of them sovereign in one sense and neither of them sovereign in another.

The thing  
in a  
nutshell.

How the  
sovereignty  
of the  
people is  
exercised.

We say that "the people" are sovereign in the United States, but this statement needs a word of explanation. We are all well aware that the people, in exercising their sovereign will, must do it in a prescribed way. They cannot, by mere majority vote, order everything as they please. Action by a two-thirds vote on the part of Congress, ratified by the legislatures of three-fourths of the states, or, alternatively, action by a convention called together at the request of two-thirds of the state legislatures with subsequent ratification in three-fourths of them—that is the manner in which the ultimate sovereignty of the people can be exercised.

The American sovereign, as Lord Bryce once said, is a sovereign who sleeps. He wakes up periodically and changes the fundamental law of the land. Then he goes to sleep again. In other words an exercise of ultimate popular sovereignty takes place only at intervals, that is, when the people change the national constitution. There are many things which cannot be done in the United States without rousing this sleeping sovereign to action. In no other way, for example, could the President's term be lengthened to six years, or the date of his inauguration be moved, or the rules relating to his veto power be changed.

The forty-eight states of the Union are very unequal in size and population, but they are equal before the law. No one of them possesses any governmental powers not given to the rest. All are subject to the same constitutional limitations. All have the same obligations to the national government, to one another, and to citizens of the United States. No state has any special privileges as a member of the Union. Congress is not permitted to make any differentiation or to play any favorites among them. It must treat them all with an even hand.

Legal  
equality  
of the  
states.

On the other hand Congress may exact, and sometimes has exacted, certain conditions as the price of a new state's admission to the Union. It can do this because full discretion as to whether a state shall be admitted or not rests in its own hands. In 1894, for example, Utah was required as a condition of its admission to abolish plural or polygamous marriages and to make the abolition "irrevocable without the consent of the United States." But once a state is actually admitted to the Union there is no longer any legally binding force in these promises or conditions. Upon being granted by Congress the privileges of statehood, a state becomes entitled to and possesses all the rights of dominion and sovereignty which belong to the original states and stands upon an equal footing with them in all respects whatsoever. No continuing political limitations other than those provided for all the states by the terms of the federal constitution can be imposed.<sup>1</sup> Arizona, immediately after being admitted to statehood, put a vetoed provision back into her constitution and there was nothing that could be done about it.

Terms of  
admission  
to the  
Union.

The constitution places no restrictions upon the creation of new states except that "no state shall be formed or erected within the jurisdiction of any other state, nor shall any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the state concerned."<sup>2</sup> The process of admission to statehood is relatively simple, the usual first step being the presentation of a petition to Congress from the people of a territory asking that they be organized as a state of the Union. If Congress regards this petition favorably it passes an Enabling Act, authorizing the people through a constitutional convention, to draw up a state constitution. This constitution, having been framed and accepted by the people, is then submitted to Congress, whereupon, by a resolution of that body, the territory is declared to be a state and its representatives are admitted to the national legislature.

Creation  
of new  
states.

All the states, old or new, are entitled to certain guarantees at the hands of the national government. The first of these is

Federal  
guaran-  
tees to  
the  
states:

<sup>1</sup> *Bollin v. Nebraska*, 176 U. S., 83 (1900). If, however, the condition imposed by Congress is such as to establish a property right, this right may not be impaired by subsequent action of the newly-admitted state. *Stearns v. Minnesota*, 179 U. S., 223 (1900).

<sup>2</sup> Article iv, Section 3.

1. A republican form of government.

the guarantee of "a republican form of government."<sup>1</sup> Just what is meant by that phrase the constitution does not explain; but it is reasonable to assume that what its makers had in mind was the general type of government existing in the original states at the time the national constitution was adopted. "No particular form of government," declared the Supreme Court on one occasion, "is designated as republican. . . . All the states had governments when the constitution was adopted. . . . These governments the constitution did not change. . . . Thus we have unmistakable evidence of what was republican in form, within the meaning of the term as employed by the constitution."<sup>2</sup> So long, therefore, as a state continues to maintain any reasonable approximation to a government which derives all its powers, directly or indirectly, from the great body of the people, it is deemed to have a government republican in form. The denial of suffrage to women, prior to the adoption of the nineteenth amendment, did not make the government of any state "unrepublican." Neither does the partial substitution of direct for representative methods of legislation by means of the initiative and referendum. The Supreme Court has wisely refrained from any attempt to restrain the development of state government within rigid bounds by construing the term "republican" too narrowly. And in any case it is Congress, rather than the Supreme Court, that usually decides the question. For Congress decides whether senators and representatives from any state shall be allowed to take their seats in Washington. This it does by virtue of the power of each House to decide controversies relating to the qualifications of its own members. So, if Congress holds the government of any state to be unrepublican in form, it need only refuse admission to senators and representatives from that state until matters are set right.

2. Protection against invasion and aid against internal disorder.

The constitution also guarantees to the states that the whole nation shall "protect each of them against invasion; and on the application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."<sup>3</sup>

<sup>1</sup> Article iv, Section 4. Some thought the insertion of this guarantee to be a needless precaution. "But who can say," wrote Madison, "what experiments may be produced by the caprice of various states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?"

<sup>2</sup> *Minor v. Happersett*, 21 Wallace, 162.

<sup>3</sup> Article iv, Section 4.



This guarantee is couched in terms sufficiently definite to prevent any serious misconception of its scope. In case of invasion the federal government's intervention does not have to be invited; but in the event of riots or other internal disorder an express request must be made by the state authorities in the manner prescribed. The national government may, however, intervene to quell disorder, even without a state's invitation or consent, if local violence is impeding the proper exercise of any federal function such as the transmission of the mails or the collection of the national revenues.

The powers of the several states are of course not enumerated in the federal constitution. To look for them there would be to misconceive the fundamental nature of that document. When one man gives to another a deed of certain lands he does not include a list of all the property he still has left. Neither did the states, in surrendering certain powers, make any catalogue of those retained. All unmentioned governmental powers remain where they were originally—with the states. This point will bear repetition, for despite its simplicity and importance, there is no feature of the American constitutional system so persistently misunderstood by the average citizen.

On the other hand the federal constitution curtailed the authority of the states in three ways: by transferring certain powers to the national government, by prohibiting the states from doing various things, and by placing some interstate obligations upon them. The powers transferred to the nation have already been discussed. The prohibitions laid upon the states are to some extent similar to those placed upon Congress; but with some important additions. And the obligations have to do with matters of interstate comity.

The prohibitions laid upon the nation and the states alike are those relating to bills of attainder, *ex post facto* laws, and titles of nobility, all of which are forbidden. In addition the constitution forbids the states to enter into any treaty or alliance, to coin money or to issue paper money, to make anything but gold and silver a legal tender in payment of debts, to lay any duty on imports or exports, to keep troops or ships of war in time of peace, or to engage in war unless in imminent danger of invasion. These various restrictions were placed upon the states in order that various powers of the national government

The powers of the states are not enumerated in any constitution.

Prohibitions upon the states:

1. In general.

(such as the conduct of foreign affairs and the control of commerce) might not be interfered with. They are intended to render certain federal powers exclusive in their nature.

2. The impairment of contract obligations.

The Dartmouth College Case (1819).

A restriction upon the states which has given rise to some famous controversies is that which forbids the states to pass any "law impairing the obligations of contract." One of the earliest, and certainly the most notable, of these was the Dartmouth College Case which came before the Supreme Court in 1819.<sup>1</sup> The point at issue was as to whether the charter of Dartmouth College was a "contract" and hence protected against any hostile interference on the part of a state legislature. The Supreme Court held that it was a contract and that the state legislature had no power either to revoke it or to impair its value. This does not imply, however, that when a private corporation is given a charter it can never be taken away or changed. The state legislatures, in granting charters, can make them revocable at will and most of them now do this. And even when such reservation is not made, a charter is no more inviolable than any other form of property and it can be taken away whenever the public interest so requires, provided just compensation be given. Not only that, but if the impairment of a corporate charter be demanded by the interest of public safety, health, or morals, the police power of the state is a sufficient warrant for abrogating or changing it without any compensation.

Charters of public corporations.

The rule in the Dartmouth College Case applies to the charters of private corporations only. The charters of public corporations, such as cities, counties, or boroughs, are not contracts and are in no case protected by this constitutional provision against revocation or change at will. The municipality is merely the agent of the state established for the more convenient administration of its local functions and so far as the federal constitution is concerned the legislature has unlimited power to repeal or amend its charter. But in many of the state constitutions, as will be seen later on, a certain degree of protection or "home rule" is guaranteed to cities and various limitations are placed upon the legislature's authority with reference to them.

A contract is an agreement enforceable at law. When the parties to a contract acquire rights of property therein, the state is not permitted, by the passage of any adverse law, to

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheaton, 518.

impair such rights without compensation unless the interests of the public safety, health, or morals so require.<sup>1</sup> In determining what relations come within the category of contracts and are hence entitled to this protection, the courts, however, have held to rules of strict construction. A license to carry on any given form of business, for example, is not a contract within the meaning of the impairment prohibition. It does not give its holder a vested right.

The fourteenth amendment, in addition to imposing upon the states the same limitation which applies to Congress with reference to the deprivation of property without due process of law, adds the provision that no state shall make or enforce any law abridging the privileges and immunities of citizens of the United States, "nor deny to any person within its jurisdiction the equal protection of the laws."

This broad limitation upon the states has had, during the half century which has elapsed since its insertion in the constitution, an interesting history. Its general intent was plain enough. The negro had been set free during the Civil War and the main purpose of the fourteenth amendment was to provide him with an effective guarantee against hostile discrimination in the future laws of the southern states. So clearly was this purpose apparent that not long after the adoption of the amendment the Supreme Court expressed its doubt "whether any action by the state not directed by way of discrimination against the negroes as a class or on account of their race" would ever be held to be an infringement of its provisions."<sup>2</sup>

Yet, strangely enough, the negro has managed to obtain during the past forty years scarcely a whiff of this solicitude. The Supreme Court presently resolved its own doubts by ruling that "every one everywhere," including corporations, was included among those entitled to the equal protection of the laws.<sup>3</sup> And at once the court's docket began to be crowded up with the appeals of corporations against alleged discriminations on the part of various states, while the negro, for whose particular benefit the amendment was provided, soon dropped out of the matter

3. Limitations in the fourteenth amendment.

Purpose of this provision.

Its scope widened.

The flood of litigation in consequence.

<sup>1</sup> There is no provision in the federal constitution prohibiting Congress from passing any law which impairs the obligation of a contract. The prohibition applies only to the states.

<sup>2</sup> *Slaughter House Cases*, 16 Wallace, 36.

<sup>3</sup> *Santa Clara Co. v. Southern Pacific Co.*, 118 U. S., 394.

altogether. The litigation based upon the fourteenth amendment has been inordinately large. The Supreme Court, during the forty-four years from 1868 to 1912, rendered more than six hundred decisions in elucidation of its provisions. Less than a score of them had to do with alleged discrimination against negroes.<sup>1</sup> More than half the six hundred were controversies in which corporations invoked the provisions of the amendment against the exercise of state authority.

"The equal protection of the laws."

As the fourteenth amendment parallels to a certain extent the wording of the fifth, its guarantees against deprivations without due process of law and in relation to the taking of private property for public use have already been discussed.<sup>2</sup> But the requirement as to "the equal protection of the laws" is an additional one and demands a word of explanation. The words do not require that all individuals or corporations shall be treated absolutely alike by the laws of a state. They merely insist that where any distinction is made by law between different classes of individuals and corporations *it shall be based upon some reasonable ground and shall not be of the nature of an unfair discrimination*. It is proper, for example, to restrict certain professions to residents of the state as against non-residents, or to persons of the male sex. It is allowable to make rules relating to one class of industries but not to others, provided the classification is a reasonable one. Such distinctions are not regarded as denying the equal protection of the laws. But where the laws of a state are clearly intended to impose a disability upon certain persons or corporations while giving immunity therefrom to others whose position is substantially similar, then the protection of the fourteenth amendment may be invoked. Even "though a law be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."<sup>3</sup>

<sup>1</sup> C. W. Collins, *The Fourteenth Amendment and the States* (Boston, 1912).

<sup>2</sup> *Above*, pp. 351-352.

<sup>3</sup> *Yick Wo v. Hopkins*, 118 U. S. 356. The law in question was one which required that all persons desiring to establish laundries in frame buildings in San Francisco should first obtain licenses from city officials. It was evidently designed to provide the local politicians with a new source of revenue.



The "obligations" placed upon the states by the federal constitution relate to interstate comity and to extradition. In general the several states are independent of one another. Each has its own laws, courts, and officials whose authority does not extend beyond the state limits. Yet matters often arise which involve a reference to the laws or judicial decisions of another state and the constitution lays down the principle of interstate comity which shall apply in such cases. "Full faith and credit," it stipulates, "shall be given in each state to the public acts, records, and judicial proceedings of every other state."<sup>1</sup> When, therefore, a civil issue has been tried by the courts of one state the judgment will be recognized and enforced by the courts of every other state without a retrial of the issue. The provision does not apply to criminal judgments; no state is required to enforce the criminal laws of any other state. It will surrender an accused person to the state from which he has fled, but will not try him, or punish him, or enforce a penalty that has been imposed elsewhere.

Constitutional obligations on the states:

1. "Full faith and credit."

The obligation of interstate comity requires that when any legal proceeding is carried out within the jurisdiction of one state, in proper accord with the laws and usages of that state, it will be recognized as a valid act by all the other states. A marriage, if legally contracted in one state, is held to be valid in all the others, however different their rules may happen to be. So with deeds, wills, or contracts. The laws of Massachusetts require that a will shall be attested by three witnesses, each of whom shall sign in the presence of each other. Yet if some other state requires only two witnesses, a will made there and so attested would be held valid in Massachusetts. The same is true of contracts. The "law of the place of contract" governs the making of it. If valid at the place of contract the courts of every other state will lend their aid toward having it carried out.

What interstate comity requires.

In the matter of divorces the "full faith and credit" clause has had the greatest strain put upon it. Divorces are granted in different states under widely varying conditions. One state (South Carolina) allows no divorces to be granted by any of its courts for any reason whatsoever; a few other states maintain rules so strict that divorce decrees are infrequent. Others,

The recognition of divorce decrees.

<sup>1</sup> Article iv, Section 1.

again, let people obtain them more easily, while one or two states have regulations of the most lenient sort. Yet despite this diversity of practice throughout the country a decree of divorce, if granted by any court having rightful jurisdiction in one state, is valid in every other state.

The  
rule in  
*Haddock*  
v.  
*Haddock*.

The Supreme Court, however, has laid down some rules as to the essentials of rightful jurisdiction. It has ruled, for example, that no court in any state may render a decree of divorce which will be binding in other states unless the plaintiff in the case is a *bona fide* resident of that state. Certain formalities in the way of notice to the defendant must also be complied with. Nevertheless the obligatory recognition of divorce decrees, so easily obtained in some states, has been grossly unfair to others in which better standards are maintained. It is unfortunate that the whole matter of determining the legal grounds for divorce and of regulating the procedure in such controversies was not at the outset given to Congress so that it might be dealt with uniformly throughout the country. This would have saved the nation from what has proved to be, in numberless cases, a mockery of justice and a challenge to social morality.

2. The  
extradition  
of  
criminals.

The extradition of criminals is another obligation placed by the national constitution upon the several states.

"A person charged in any state with treason, felony, or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."<sup>1</sup>

That is the way the provision reads. At first glance it seems plain and simple, but it is by no means so simple as it looks. To understand the matter, one should first know something about the process of international extradition, the surrender of criminals by one nation to another.

Extradi-  
tion  
among  
nations.

Among the nations of the world the extradition or delivering up of criminals is provided for by treaty and is governed by the general limitations contained in these treaties. Between different nations there is no extradition of offenders unless the offence be one enumerated in the treaty. An accused person, moreover, if he be extradited for one crime may not be placed on trial for some different crime. It is usual to provide in ex-

<sup>1</sup> Article iv, Section 2.

tradition treaties, again, that a nation shall not be bound to hand over its own citizens nor to give up persons charged with political offences. Subject to these limitations a criminal who makes his escape from the United States to another country can now be extradited or brought back. The procedure is to send a request through the department of state at Washington accompanied by various documents showing the nature of the charge against the individual whose extradition is desired. These papers go to the other country through the regular diplomatic channels.

As between the various states of the Union the general idea is the same although the conditions are quite different. Extradition between the states is not subject to the limits which are imposed upon extradition between different countries. There is no enumeration of the offences for which the return of an offender may be requested. The words of the constitution are "treason, felony or other crime." Nor is there any rule against extraditing an offender on one charge and trying him upon another. States freely give up their own citizens, moreover, to be tried in other states of the Union when properly asked to do so. On the other hand no one may be brought back from one state of the Union to another, unless he is actually a "fugitive from justice" as the words of the constitution expressly require. A state cannot demand the return of any one who was not actually within its jurisdiction at the time the offence is alleged to have been committed.

How interstate extradition differs.

This limitation has given rise to some interesting questions. If a man commits a murder in Vermont and escapes into Massachusetts the matter is clear enough; he is a fugitive from justice and can be brought back. But suppose a man, standing near the boundary line of Vermont, fires a shot which kills somebody on the Massachusetts side of the line. Can he be tried in Vermont? Not for killing anyone, for nobody was killed in Vermont. Can he be extradited to Massachusetts and tried there? No, because he is not a fugitive from Massachusetts. Or, suppose someone sends an infernal machine through the mails from New York to Chicago. The recipient opens the package, and that is the last seen of him. The sender is discovered and arrested. Can he be tried for murder, and if so, where? He can be brought before the federal court for an of-

Some loopholes in the system.

fence against the postal laws, to be sure, but what about state jurisdiction? It will be seen, therefore, that the extradition clause of the constitution has some puzzles in it.

The procedure in interstate extradition.

The procedure in securing the return of anyone who is really a fugitive from justice is simple enough. Legal proceedings are started in the state where the offence was committed, and an indictment is obtained. The arrest of the offender, wherever he happens to be, is arranged for. Then a requisition, signed by the governor of the demanding state, is taken by a police officer to the governor of the state in which the offender has taken refuge. If this requisition is found to be in proper form it is honored by the latter and the prisoner is handed over to the officer to take him back.

Mandatory in form but discretionary in fact.

Occasionally a prisoner, through his counsel, resists extradition, in which case the governor will hold a hearing to determine whether the requisition shall be honored. He may refuse on the ground that the charge is a trumped-up one, or because he feels that the prisoner, if surrendered, will not get a fair trial, or on any other ground. At times the surrender of a prisoner is refused, although there is usually no disinclination to honor requisitions when they come in proper form. But when a governor declines to hand over an offender, there is no way of compelling him to do so. True, the words of the constitution are "shall be delivered up"; but the Supreme Court has declared that it will not undertake to force any governor to act against his will in this matter. The power is mandatory in form, but discretionary if a governor chooses to make it so.

The general obligations of states.

While these two obligations of comity and extradition are imposed upon the states by the federal constitution in express terms, there are others which, while not so expressed, may rightly be regarded as of equal force. To further the interests of the whole Union the states must provide the machinery for the election of senators and representatives; they must place no obstacles in the way of national officers in the proper performance of their duties; they must give loyal adherence to the spirit of the constitution and by the enlightened character of their laws endeavor to promote the national prosperity.

The need for coöperation.

The American scheme of government requires coöperation between the states and the nation. It requires, for its efficient working, that the states shall help the national government even



when they may be under no legal obligation to do so. During the world war, for example, the governors of all the states were asked to organize draft boards. They were under no legal obligation to assume this function, and if they had refused to do it there was no way of compelling them. But all the governors did whatever the national government asked, and did it gladly. Their coöperation, indeed, was largely responsible for the success with which the system of selective service was put into operation.

## CHAPTER XXIX

### THE STATE CONSTITUTIONS

In all of the states the power to amend their constitutions resides in the great body of the people as an organized body politic.—*Thomas M. Cooley.*

The  
original  
state con-  
stitutions.

The basis of state government is the state constitution. Each of the thirteen original states had adopted a constitution before 1787 and thus was able to come into the Union fully organized. Since the organization of the national government thirty-five others have been admitted. Each of these forty-eight states has the right to make and unmake its own constitution at will, subject only to the limitation that it must not run counter to any provision in the Constitution of the United States. Each determines for itself the procedure by which its constitution shall be framed and amended—whether by a constitutional convention, by the legislature, or by direct action of the people through the initiative and referendum.

How a  
state  
constitu-  
tion  
is made.

The usual method of framing a state constitution is to call a convention for that purpose. The procedure in most of the states (but not in all of them) is as follows: The state legislature, when it sees fit, refers to the people the question whether a constitutional convention shall be called.<sup>1</sup> It puts this question on the ballot at a state-wide election. If the people vote in the affirmative, an election is then held to choose the members of the convention. Usually they are elected by senatorial or assembly districts but some are occasionally chosen by the voters of the whole state, delegates-at-large they are called. The size of the convention is fixed by the state legislature. The Massachusetts convention of 1917 had three hundred and twenty members; the Illinois convention of 1920 had only one hundred and two.

<sup>1</sup> In some states it is provided that the question of calling a constitutional convention must be submitted to the people at stated intervals—every seven years, or twenty years—irrespective of any action by the legislature.

In due course the delegates assemble at the state capitol, usually when the legislature is not in session. They elect their own presiding officer, appoint their committees, and proceed to the only business of the convention, which is that of preparing the draft of a new constitution or suggesting amendments to the existing one. Proposals are filed, like bills in a legislature, and these are referred to the appropriate committees. The various sections of the existing constitution are also apportioned among the committees for such revision as they may suggest.<sup>1</sup> The committees make their reports and the convention deals with them very much as a legislature would do.

The  
convention.

The superficial resemblances between a constitutional convention and a legislature are so numerous, indeed, that the fundamental differences between the two are apt to be overlooked. A legislature is avowedly a partisan body; its members are divided into two well-defined party groups, each committed to the carrying-out of a party programme. In a constitutional convention, on the other hand, party lines are not so sharply drawn. Compromises are more frequent, for the constitutional convention is above all things a deliberative body. Of itself it can take no final action. All that it prepares must go to the people for ratification.<sup>2</sup> Compared with a legislature the number of matters with which a constitutional convention has to deal are relatively few and they touch the fundamentals of government. Hence a full and free discussion on every subject is not only more practicable but more urgently desirable in the latter. The rules of a legislature are designed to expedite business; those of a constitutional convention aim rather to afford an opportunity for careful consideration without an undue prolongation of sessions. The work of a legislature, again, is restricted by the state constitution but there are no limits to what a convention may consider. Obviously the state constitution does not hamper it.

Conven-  
tions and  
legisla-  
tures  
compared.

<sup>1</sup> The committees are usually appointed by the presiding officer of the convention. The Michigan convention of 1897 had 28 standing committees; the Ohio convention of 1912 had 25; the New York convention of 1915 had 30; the Massachusetts convention of 1917-1918 had 24 and the Illinois convention of 1920 had 25. In size these committees ranged from 5 to 21 members. The function of the committees is to hold public hearings upon the various proposals and on the conclusion of these hearings to make recommendations to the convention.

<sup>2</sup> There are occasional exceptions to this. The Virginia constitution of 1902, and the Louisiana constitutions of 1913 and 1921 were put into force without popular ratification.

Finally, the members of a legislature are elected for a designated term while the delegates in a constitutional convention are chosen to perform a specified task and are not usually restricted as to the time in which they shall accomplish it. Indeed it is a question whether the legislature, in calling a constitutional convention, can impose a time limit (or any other limitation) unless the existing constitution expressly authorizes it to do so.

Ratification by the people.

When the convention has finished its work the provisions of new constitution (or the series of amendments to old constitution) are then submitted to the people of the state at a regular or special election. There are some practical advantages in submitting amendments rather than a new constitution. When the convention submits a new constitution, the people have no option but to accept or reject it as a whole. Every voter who objects to any provision in it then votes *No* and this cumulative opposition is usually enough to ensure its defeat. New York afforded us a good illustration in 1915. There the constitutional convention did a good piece of work on the whole, but it adopted a few provisions which aroused strong opposition in various quarters. And inasmuch as people usually vote their resentment rather than their appreciation, they voted to reject the whole document. The Massachusetts convention of 1917-1918, on the other hand, submitted twenty-two amendments, all of which were accepted by the people. The Nebraska convention of 1920 submitted forty-one amendments, most of which were ratified at the polls. This method affords each proposed change in the constitution an opportunity to stand or fall on its own merits. It is possible, of course, to combine both plans—to submit both a new constitution and a series of amendments.

How constitutions may be amended.

1. By legislative proposal and popular ratification.

When it is desired merely to amend a state constitution in certain definite particulars it is not necessary or even usual to call a convention of delegates. Most state constitutions provide simpler methods of amendment. One of the ways permits the legislature (although sometimes requiring more than a majority vote, and sometimes requiring that the resolution be passed more than once) to submit proposals of amendment. In such cases, after a proposed amendment has duly passed the legislature, it goes on the ballot, and if accepted by the voters becomes an effective part of the constitution. Usually a bare



majority of the voters who vote upon the amendment is sufficient, but in some states a majority of all those voting at the election is required. In other words it is a difference between "voting thereon" and "voting thereat." This is an important difference, because many voters mark their ballots for the candidates at a regular election and pay no attention to the proposed constitutional amendments.<sup>1</sup>

The other way is by the use of the initiative petition. This institution, which in its application to constitutional amendments originated in Oregon in 1902, will be more fully discussed in a later chapter; it will suffice here to say that in fourteen states the voters may initiate proposals of constitutional amendment by means of a petition. If this petition bears the requisite number of valid signatures, the proposal goes by referendum to the people, without any affirmative action of the legislature being necessary, and if adopted at the polls becomes a part of the constitution. Either method allows the submission of several amendments on the same ballot, and almost every year, in many states, several amendments are submitted.

State constitutions display considerable variation in size, in scope, and in the amount of detail which they contain. All of them are more elaborate than the national constitution. The constitution of New Jersey is the shortest among them, and covers only fourteen pages; that of Louisiana is the longest, covering about ninety pages which deal with detailed matters of every sort. The tendency everywhere is to lengthen these documents, putting more things in the constitution and thus leaving less freedom to the legislature. This is one of the indications of our waning confidence in the wisdom and integrity of legislative bodies. Whenever any state adopts a new constitution we can be reasonably sure of one thing, namely, that it will be a good deal longer than the old one.

The original state constitutions were short and simple—that of Virginia contained only fifteen hundred words. And down to the Civil War period there was no considerable lengthening. During the past seventy-five years, however, the constitutions have been steadily expanding into veritable law codes. Some of them now fix the salaries of state officers (even subordinate

2. By the initiative and referendum.

General nature of state constitutions.

Their steady expansion in size.

<sup>1</sup> Rhode Island requires a three-fifths majority and New Hampshire a two-thirds majority. Indiana requires a majority of the registered voters.

officers) and prescribe their duties in detail. They contain all sorts of provisions relating to the management of the schools, the regulation of banks, the control of corporations, the budget, the government of cities and towns, taxation and assessment—and even such matters as hours of labor, workmen's compensation and the minimum wage.

Baneful  
effects  
of this  
policy.

This practice of crowding a multitude of detailed matters into the state constitutions has been unfortunate in its results. It has multiplied the opportunities for litigation and has tended to give a legalistic tone to all discussions of social policy. Details, when placed in the constitution, shackle the hands of both legislators and courts. The more voluminous a constitution the more quickly it loses touch with the social and economic needs of a rapidly growing community. The federal constitution has been a marvel of flexibility because its provisions are broad and general. Its framers were wise enough to leave it silent on all matters which could be trusted to work themselves out aright in the process of time. The makers of state constitutions, during the past fifty years, have not been so sagacious. They have too often fastened upon future generations the prejudices and whims of the moment. By so doing they have hindered rather than helped the efficiency of state government.

What  
a state  
constitu-  
tion  
contains :

I. Bill of  
rights.

What does a state constitution contain? First, there is usually a bill of rights,—a series of general guarantees and limitations designed to safeguard the liberties of the citizen. This does not always come first among the provisions of the constitution (it more frequently comes last) but it is historically the oldest feature. To a considerable extent these guarantees and limitations merely repeat the provisions of the bill of rights which is contained in the first ten amendments to the national constitution. But the newer state constitutions also contain various additional guarantees and limitations. As a practical matter, most of them are now superfluous. They afford the citizen very little protection that he could not claim under the provisions of the federal constitution. But it has become an American tradition to put into the state constitution an array of venerable platitudes concerning human equality, freedom of speech, freedom of the press, due process of law, and the sanctity of every citizen's home. Under modern social and economic conditions it is impossible to apply these guarantees literally.

Second, a state constitution makes provision for the frame of government. It stipulates how the governor, the higher officials of state administration, and the members of the legislature shall be chosen. It sets forth their various powers and the relations of each to the others. It provides for the organization of the courts. And, finally, it contains provisions relating to such matters as impeachments, the militia, taxation, borrowing, local government, and education. Suffrage and elections, moreover, commonly occupy a chapter. State constitutions, by the way, are usually divided into chapters or articles, and these are subdivided into sections.

2. Provisions for the frame of government.

3. Miscellaneous sections.

Within its own sphere the state constitution is supreme. It binds the executive, legislative, and judicial branches of state government. The state legislature, in the exercise of its law-making authority, must respect all the limitations placed upon it by the state constitution. In case of controversy the highest court of the state will decide whether the legislative measure in question is or is not constitutional. As a matter of practice, however, these courts always assume that the legislature has a power until the contrary is shown. This rule, it will be noticed, is just the reverse of that applied in interpreting the powers of the national government. Congress is not deemed to possess any power unless an actual grant of that power can be demonstrated. If there be any reasonable doubt as to whether a measure passed by a state legislature is unconstitutional, the measure will be upheld.

Supremacy of the state constitution in its own sphere.

Method of interpreting it.

Strictly speaking, then, the only way in which a state legislature can determine whether any law is constitutional or not is to pass it and see. There is, however, a plan by which some states have managed to obtain authoritative opinions in advance, and thus to guard against the passing of laws which would be thrown overboard by the courts. This is known as the plan of obtaining advisory judicial opinions. Where it is in operation the governor, or either house of the legislature, may call upon the highest court of the state for an opinion upon any constitutional question which arises in connection with a pending legislative enactment. But these opinions, when given by the judges, are not binding upon them in case the same point should later arise in a suit at law. They are merely advisory, and being arrived at without hearing the arguments on both sides can

Determining in advance the probable constitutionality of laws.

Advisory judicial opinions.

never be regarded as final. On the other hand they are usually safe enough to follow.<sup>1</sup>

The  
increase  
of un-  
constitu-  
tional  
state  
laws.

Year by year it becomes increasingly difficult to keep all the laws of a state within the bounds of constitutionality. This is because state constitutions are steadily narrowing the legislature's freedom. Things which a half-century ago were left to the legislators are nowadays being dealt with by constitutional provision. The constitutional convention is becoming not only the ultimate but in some cases the proximate lawmaking body of the state, dealing with all fundamental questions and with a great many which are not fundamental. Conventions, however, meet infrequently, and in the interim the legislature must provide whatever laws are needed. The demand for social and industrial reform presses the legislature on one side; the limitations of the state constitution restrain it on the other. Between the two the plight of legislators is often embarrassing. To escape it they sometimes enact laws which they know to be unconstitutional, leaving the courts to take the odium of de-declaring them so.

Variety  
and  
uniformity  
in state  
constitu-  
tions.

Several years ago I heard a French scholar give a lecture on American government. "The government of the American state," he said, "is impossible for any human being to understand because every one of the forty-eight states has a different constitution and hence no two of them are governed alike." Strictly speaking, he was right; but the situation is by no means so chaotic as his statement would imply. The differences among the state constitutions, if they were all put down on paper, would fill a book of many hundred pages, but most of them are not of very great importance. In most of the essentials every state constitution resembles all the rest, and fundamentally all forty-eight states are governed alike. The resemblances far outweigh the differences. The American citizen, when he moves from one state to another, does not find himself under a government that seems new and strange to him.

Outstand-  
ing points  
of uni-  
formity :

In the first place every state has a republican form of government, a government subject to popular control. Every state has a constitution which emanates from the people and forms the channel through which ultimate popular sovereignty is exercised. Every state has universal suffrage, although some limit

<sup>1</sup> See also *above*, p. 404.



this by the application of literacy tests and in the southern states most colored citizens are by one device or another debarred from voting. In every state the citizen is entitled to the equal protection of the laws. Every citizen of every state is a citizen of the United States.

Second, all the states have substantially the same general scheme of government—based upon the principle of division of powers. In every state there is a governor, directly elected by the people, and he is vested with certain independent executive powers. In every state, moreover, there is a legislature of two chambers, both of which are elected by the people. And in every state there is a system of courts—usually a hierarchy of three grades—with the highest of these courts empowered to declare the unconstitutionality of state laws. The doctrine of checks and balances is recognized in all the states by giving independent functions to the executive, legislature and judicial arms of the government.

Third, the forty-eight states are each divided into areas of local government. There are counties in all of them (in Louisiana they are called parishes). There are cities in all of them. Most of them also have towns or townships. The detailed arrangements vary but the general principles are everywhere the same. For example, all areas of local government derive their governmental powers from the state and in all the states the local government is directly under the control of the people.

Finally, and this is of great importance, the party system is uniform in all the states. The same parties operate in both national and state politics and they use the same methods. The voter who is a Republican when he lives in Ohio will find his party doing business in California if he moves there. True enough the party lines in national and state politics do not exactly coincide, but they come fairly close to doing so. Political parties, as has been shown, play a very important rôle in the actual work of government and their unity throughout the nation has an obvious influence upon the states.

We are accustomed to overemphasize the element of variety in state constitutions. A great deal of variety there is, to be

1. Republican form of government.

2. Checks and balances.

3. Devolution in government.

4. Uniform party cleavages.

<sup>1</sup> In Mississippi the governor is chosen by the people under an arrangement which gives the state House of Representatives a share in the process.

sure, but a great deal of uniformity also. What is more, this uniformity is in the things that really count.<sup>1</sup>

<sup>1</sup> The best-known works relating to state constitutions are J. A. Jameson's *Constitutional Conventions* (N. Y., 1887); Roger S. Hoar's *Constitutional Conventions* (Boston, 1917); W. F. Dodd's *Revision and Amendment of State Constitutions* (Baltimore, 1917); J. Q. Dealey's *Growth of American State Constitutions* (Boston, 1915) and W. McClure's *State Constitution-Making* (Nashville, 1916). Mention should also be made of the *Model State Constitution* prepared by the National Municipal League.

## CHAPTER XXX

### THE STATE LEGISLATURE

The legislation of the states is of far greater importance to the citizen than that originated in Congress. The general law under which we live is entirely under the control of the state legislatures.—*Paul S. Reinsch.*

The legislature is the paramount branch of American state government. It makes the state laws, controls the appropriations, and determines in considerable measure the functions which the executive authorities perform. Constitutional limitations in steadily increasing number have everywhere circumscribed its authority; the use of the initiative and referendum in many of the states has further impaired its supremacy; while the development of independent administrative officials and boards has taken from it many of its regulatory functions. Yet the legislature maintains, on the whole, its position as the dominating branch of state government.

Important rôle of state legislatures in American government.

Many Americans have a wrong conception of the state legislature. They look upon it as a subordinate lawmaking body which concerns itself mainly with minor questions, with matters which are not of sufficient importance to engage the attention of Congress. It rarely occurs to the average citizen that these state legislatures supply motive power for the entire mechanism of American government in nation, state, and city. Without action by the state legislatures it would not be possible for the national government to function. A President could not be elected, nor a Congress, for the state legislatures provide the electoral machinery. The state legislatures likewise are the ultimate source of motive power in all local government, in the government of counties, cities, towns and townships.

A wrong conception of it.

The organization of the legislature differs from state to state, but in essentials it is everywhere the same. In every state it is made up of two elective chambers with substantially concurrent lawmaking powers. The upper chamber, called the Senate, is

General organization of the legislature.

the smaller of the two. Its members are elected from senatorial districts and their term of office is either two or four years, except in New Jersey, where it is three years. The lower chamber, which is variously known as the House of Representatives, or Assembly, or House of Delegates, is a much larger body; its members are chosen from smaller districts and the term of office is shorter, as a rule, being in most states only two years. Except in New England the unit of representation is almost always the county, or group of counties, or portion of a county. In New England it is the town or group of towns. These units are rearranged from time to time, usually after each decennial census, with a view to making each of them approximately equal in population. This redistricting gives an opportunity for gerrymandering which the majority party in the legislature almost invariably seizes to its own advantage.<sup>1</sup>

Why the  
bicameral  
system  
has been  
adopted.

Why have all the states adopted this double-chamber or bicameral system? To some extent the reason may be found in certain reputed merits of the plan, but the influence of the national system has also been important. When a two-house Congress was provided in the frame of national government, the example was naturally a stimulus to the states. Those states which began with one chamber replaced it in due course with two, while new states, as they were formed after 1787, established bicameral legislatures one after another. At the outset it was the practice to establish different suffrage requirements for the two chambers but this arrangement was gradually abandoned. Then arose the idea that even if the two chambers were elected by the same voters they could nevertheless be made to represent different interests—the Senate, for example, representing geographical areas and the Assembly representing units of population. With the growth of cities, and the massing of people in them, more emphasis came to be laid upon this idea of having the upper chamber represent counties or districts equally, without regard to differences in population.<sup>2</sup> There also

<sup>1</sup> The smallest state Senate is that of Delaware, with 17 members; the largest is that of Minnesota, with 67. The smallest lower chambers are those of Arizona and Delaware, with 35 members each; the largest is that of New Hampshire, with 404. In New York the Senate has 51 members and the Assembly 150; in Massachusetts, the figures are 40 and 240; in Illinois, 51 and 153; in Pennsylvania, 50 and 201.

<sup>2</sup> Occasionally, as in New Jersey, each county is equally represented in the upper chamber, no matter what its population might be. In Connecticut the



developed in the public mind a belief in the usefulness of a divided legislature as a safeguard against hasty lawmaking, and as a part of the system of checks and balances.

These are the grounds upon which the continuance of the bicameral system is commonly justified to-day, but they are not so convincing as they were a century ago. The danger of hasty or secret action, under modern rules of legislative procedure, with the printing of proposed measures, with committee hearings open to all, with three readings of every measure in the legislature, with ample opportunity for reconsideration, and with a governor's veto power in the background—with all these safeguards the opportunities for slipping measures upon the statute book without publicity are very few. Nor does the theory that one chamber will exercise a wholesome check upon the other always work out satisfactorily when put to the test of actual practice. Both chambers are made up of party men. If the same political party controls a majority in both, the check imposed by one House upon the other is rarely of much practical value; if different political parties control the two chambers, the checking often becomes so persistent that deadlocks ensue and all progress is blocked. It has been found that under normal conditions the great majority of measures which pass one chamber are accepted by the other. And this is not surprising, for the same political leaders usually control both, or, if there are different leaders, they work together. When they agree to support a measure this support is just as influential in one chamber as in the other. Constitutional conventions are made up of a single chamber, yet their work has been done far more carefully, on the whole, than the work of bicameral legislatures.

Is it  
necessary  
to-day?

The bicameral system in the state legislature is retained from force of habit and out of respect for tradition. The arguments in its favor, when soberly reflected upon, are not of great weight. A study of the facts and figures does not show that the system possesses the merits which are commonly attributed to it. On the other hand, the division of legislative authority has some serious defects. It increases the cost and the complexity

Defects  
of the  
two-  
chamber  
system.

lower chamber represents the towns irrespective of their population. Not a few states have so arranged the basis of representation that the rural districts get more than their due share of legislators.

of the lawmaking machinery; it facilitates and even actively encourages the making of laws by a process of compromise, bargaining, and log-rolling; it compels all legislative proposals to follow a circuitous route on their way to final enactment; it provides countless opportunities for obstruction and delay; and it makes easy the shifting of responsibility for unpopular legislation. Finally, it has proved a barrier to the planning of the laws. There may be some degree of leadership and planning in each house, but rarely is there any coördination of the work in both chambers unless some dominating governor oversteps the strict limits of his own functions to provide it, or unless some boss arrogates it to himself. The bicameral system has been abolished in some European countries and in most of the Canadian provinces. In the large cities of the United States it was almost everywhere in vogue a generation ago; to-day it has been abandoned. Among the twelve largest American cities not one now maintains a double-chambered council. Yet these cities are more populous than some of the states, and their problems are a good deal more complicated. It seems curious that Nevada and Delaware and Wyoming should require two chambers in their process of lawmaking, while Chicago, Philadelphia and Detroit—with much larger populations—can get along with one. Whether all the states could get along better with single-chambered legislatures is a question which cannot be answered save by actual test. Some day a progressive state will take the step. Then, if the experiment succeeds, the others will go tumbling into line after it, just as the cities did after a few courageous ones took the lead.<sup>1</sup>

Candidates for election to the legislature are nominated in the various states either by a caucus, a convention, or a primary. The caucus method can exist only where the district is so small that the voters of a party can be brought together in a single meeting. But even in small districts this plan of nomination has largely gone out of use. The convention, or body of delegates chosen by caucuses in various parts of the district, still retains its hold in some states, chiefly in the South. The primary has become the most common agency of nomination. Candi-

Methods  
of nomi-  
nating  
state  
legis-  
lators.

The  
caucus,  
conven-  
tion, and  
primary.

<sup>1</sup> In several states, the adoption of the single-chambered plan has been seriously considered. In Oregon, Arizona and Oklahoma the question has been submitted to the voters but in each case it was rejected by them.

dates are usually required to secure the signatures of a small number of voters in order to have their names placed upon the primary ballot, and at this primary the voters of each political party determine which of the various aspirants shall stand at the election as the authorized party candidate. In some cases there is, at the primary, a special ballot for each party; in others, all the names are in different columns on the same ballot.

The direct primary, as a method of nominating officials and representatives, was welcomed as a device which would help to raise the standard of candidacy at elections. The old convention, it was said, encouraged manipulation and trickery. It allowed political bosses to put forward candidates who would never be selected by the rank and file of the voters on their own initiative. The way to remedy that situation, reformers urged, was to place directly in the hands of the people the nomination as well as the election of their representatives. This would give a fair chance to men of ability and independence, to men who were not professional politicians, to men who could appeal for nomination upon their own merits and not merely upon grounds of party regularity.

Purpose  
of the  
primary.

Under the convention plan the voters of each party choose delegates to the convention and these delegates nominate the candidates. Under the direct primary the voters select the candidates themselves, without the intervention of delegates. Those who wish to be nominated for the legislature merely file petitions; their names are placed on the ballots, and the voters of each political party then choose their own candidates from among these names. It is, as the name implies, a preliminary election or primary election. As a rule all the political parties hold their primaries on the same day; they use the same voting places, but each has a separate ballot. In some cases, however, a single ballot bears the names of all the candidates.

The new method of nomination has now had a fair trial. Has it proved superior to the convention as a means of securing capable legislators in the several states? On the whole, perhaps it has, although there is no certainty of it. At its best the convention was capable of making good selections; the direct primary has not often shown itself able to reach as high a standard. On the other hand the convention at its worst could strike a plane of arrogance, trickery, and corruption to which a primary

Has it  
achieved  
its  
purpose?

rarely descends. In a word, the primary seems to afford protection against the worst fault of the convention, which was the frequent selection of incapable and corrupt candidates at the behest of a few political leaders. But it has not demonstrated that it can achieve positive results of a satisfactory character. It has not rid the states of boss domination; it has increased the expense which every candidate must incur, and it gives a marked advantage to the man whose name is well known to the voters, whether he be a professional politician or not.

Its most  
serious  
defect.

The worst of its faults is the barrier which it interposes to responsible party leadership. The direct primary is the people's affair; the party leaders are supposed to let it alone. If they intervene with suggestions as to whom the people should nominate, they are scolded as bosses and dictators. So they usually do not come out into the open but try to manipulate the primary from behind the scenes and very often they succeed in doing it. The voice of the direct primary is the voice of the people but the hand is very often the hand of the politicians. The fundamental defect of the direct primary is its assumption that great masses of people will go to the polls and act wisely while the party leaders keep their hands off. But party leaders can be counted upon to do nothing of the sort. They will try to control the primary and in most cases they will find a way of doing it. Then, when they succeed, they can disclaim all responsibility. It is the people who have done it. The truth is that a small portion of the people have done it, this small portion being mainly composed of the "regulars" whom the party leaders control. The direct primary has put these leaders to extra trouble; it has made them work under cover, work harder and spend more money. But it has not broken their power except temporarily and then only in scattered instances. That is why some bosses are now wondering why they ever feared the primary, while some reformers are wondering why they ever favored it.

What is  
the  
alterna-  
tive?

But if not the direct primary, what then? Shall we abolish it and return to the old convention system of nominating candidates? A few states have taken that step but it is by no means likely that their action will be generally followed by the others. It is more probable that the next step will be to try a combination of the two plans. This, indeed, is what a few states



have already done. Minnesota, for example, has adopted a scheme by which conventions are first called by each party to make the nominations. Then, if the members of the party are not satisfied, they may submit alternative nominations by circulating petitions and a primary is thereupon held to decide between the two. This, it will be seen, adds another wheel to the electoral machine. The man or woman who wants a state office must fight for it in the convention, then in the primary (if there is opposition), and finally at the state election. But it is quite possible, and even probable, that under normal conditions there will be no opposition, no widespread objection to the convention's candidates, and hence no need for a primary. The primary would then become a reserve weapon, its use restricted to occasions when the convention does its work badly. There is much to be said for an arrangement of this sort if it can be brought about.

State elections are by secret ballot, voting machines being sometimes used. The polling is in some cases held upon the same date as the congressional and presidential elections; in others on a different date. Each state, under the constitutional rules already set forth as to race and sex discriminations, determines who may vote for members of its own legislature, but universal suffrage is now everywhere in vogue. All the states have a minimum residence requirement and some of them have literacy tests for voting. A plurality of votes is ordinarily sufficient to elect. Only one state, Illinois, provides for minority representation.<sup>1</sup>

The  
election  
of state  
legislators.

The quality of state legislators is considerably higher in some parts of the country than in others. It varies, indeed, as between different parts of the same state. On the whole, however, it is fairly representative of the whole electorate. This is not the general opinion but any careful study of the matter will show it to be the case. Almost every profession and business vocation, almost every degree of education and ignorance, almost every degree of opulence and penury, will be found represented. Lawyers usually predominate, except in the strongly agricultural

Quality  
of the  
men  
chosen.

<sup>1</sup> Illinois is divided into 51 districts, each of which elects three representatives. Every voter is allowed three votes, all of which he may give to one candidate, or one to each, or two to one and one to another, as he chooses. This permits the minority to elect one of the three representatives in the district.

states, and even there they manage to figure considerably. It is a frequent assertion of reformers that the standards of membership in the state legislatures are far below what they ought to be, but the truth is that they are rather above than below the average of the state population which elects the legislators.

Frequency  
and  
length of  
legislative  
sessions.

In most states the legislature holds its regular sessions every two years. In only a few are annual sessions regularly convened.<sup>1</sup> These sessions, whether biennial or annual, ordinarily continue for two months or more with brief adjournments from time to time. In many states the constitution provides that the legislative session may not continue during more than a prescribed number of days.<sup>2</sup> In others the same end is virtually achieved by a provision that the legislators shall be paid so much per day for so many days and no longer. Special sessions may be convened by the governor when necessary.

Powers of  
state  
legisla-  
tures.

The powers of the state legislature, as has been said, are broader and more important than the casual student of American government realizes. They comprise every field of governmental activity not restricted by the federal constitution or by the constitution of the state itself. Those limitations upon the states which are provided by the federal constitution have already been mentioned. Those which the state constitutions impose relate not only to the rights of the citizen, but to many other matters on which the limitations differ from state to state. A few examples will illustrate the general character of these prohibitions.

Limita-  
tions  
thereon :

1. In the  
federal  
consti-  
tution.

2. In the  
state  
constitu-  
tion.

Legislatures are sometimes forbidden by the terms of their own state constitutions to grant special charters to municipalities or to private corporations, or to authorize public borrowing beyond a fixed point, or to impose property qualifications for voting, or to grant public money to sectarian institutions of education, or to give perpetual franchises to public service corporations, or to lend the state's credit to private enterprises, or to

<sup>1</sup> These are Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina.

<sup>2</sup> The limit ranges from forty days in Oregon and Wyoming to ninety days in Maryland and Minnesota, and five months in Connecticut. In California the legislature holds a thirty-days session during which bills are introduced. Then comes a recess of equal length during which the legislators discuss these measures with the organizations and voters of their respective districts. Following this interval the legislature resumes, with no limit upon the duration of its session.

change county seats without the consent of the voters concerned, or to reduce the salaries of judges, or to make discriminations in the tax laws, and so forth. In addition to these actual prohibitions the state constitutions often prescribe in detail the way in which many things shall be done; even the methods of procedure in the legislature are sometimes prescribed in detail. For example, it is sometimes stipulated that all bills shall be printed before being acted upon, that no bill shall deal with more than a single subject, and that there shall be a roll call on certain measures. The tendency is to increase the number and extent of these restrictive provisions, so that the state constitutions have become much more than codes of fundamental law.

Yet despite its narrowing sphere of action the work of the state legislature comes much nearer than that of Congress to the daily routine of the citizen. The state laws, for example, provide for the proper registration of a child's birth; they determine the qualifications of the physician who attends him during infancy; they establish the schools in which he gets his education. When the child becomes a man, the state laws regulate the profession or the trade he enters; the state laws enable him to marry, to accumulate property, to vote, to hold office; the state laws provide for the issuance of a burial permit when he dies and regulate the transmission of his property to his heirs. From his birth to his death the state laws, through the agency of subordinate municipal authorities, provide the citizen with police protection, with redress for wrongs done to him, with highways and sanitation, with libraries and recreation facilities. The state laws determine most of the taxes which he pays; they impose penalties upon him when he does wrong. The state laws reach out into the shops and factories, regulating the hours and conditions of labor. They provide for the care of the poor, the insane, and the delinquents of all ages. Where federal statutes touch the citizens once, the state laws influence his actions a hundred times. The average citizen does not realize all this because he has become so completely habituated to it.

In the exercise of its lawmaking function throughout this broad expanse of jurisdiction each state legislature determines its rules of procedures, subject, however, to any provisions that are laid down in the state constitution. Practically all the state legislatures, however, have followed the general example of

The broad field which remains within these limits.

Legislative procedure.



Modelled  
on that of  
Congress.

Congress, so that their legislative procedure is not far from uniform. This applies to the presiding officer of each house, the system of committees, the method by which the two chambers take action upon pending measures, and the general rules of debate.

The pre-  
siding  
officers  
of state  
legis-  
latures.

As for the presiding officers, the influence of the federal analogy is everywhere apparent. When a state has a lieutenant-governor, he usually (but not always) presides over the state Senate just as the Vice President of the United States is the presiding officer in the upper house of Congress. Otherwise the state Senate chooses its own chairman. The lower chamber of the state legislature everywhere elects its own Speaker. In practice, the choice is first determined by a caucus of members of that political party which controls a majority in the House and is then formally ratified by the chamber as a whole. This Speaker has the usual functions of a presiding officer, including, in about two-thirds of the legislatures, the duty of appointing all members of committees from his own chamber. In the remaining one-third the committees' assignments are made, as they are now made in Congress, by a committee on committees. Each house of a state legislature also chooses its other officers, chaplain, clerk, sergeant-at-arms, and messengers.

Legis-  
lative  
commit-  
tees.

Much of the preliminary work of the state legislation is performed by committees, and every legislature maintains a considerable number of these subordinate bodies. In nearly all of them there are separate committees for each chamber, but in a few (notably in Massachusetts) nearly all committees are joint committees made up of members from both chambers. This system of joint committees avoids much duplication of work. In size the committees vary, running from as few as five to as many as forty-five members or more. The committees are also of varying degrees of importance. Some of them, such as the committees on finance, or ways and means, on rules, on the judiciary, on labor, on industrial affairs, on cities, on education, on public institutions, and on public utilities, may have a great deal to do. Others, such as those on printing, on fisheries and game, on pensions, and on federal relations, may have very little. In addition to these regular or standing committees there are special committees which are appointed whenever the occasion arises. Special commissions, including persons who do not belong to the



legislature, are also authorized to study important matters and to make recommendations. This arrangement enables a legislature to make use of expert assistance outside the ranks of its own membership.

Every measure introduced into either house of the legislature is forthwith referred to the appropriate committee. There, in regular order, hearings are held, and at those hearings both the supporters and opponents of the measure are entitled to appear. The members of the committee sit patiently and listen—some of them do. Unfortunately a legislator may be a member of several committees and he cannot attend two hearings at the same time. In some states, the rules require that a hearing shall be advertised upon every measure, and that before a certain date every matter referred to a committee shall be reported back, favorably or otherwise, to the legislature. In some other states such hearings are not held except upon important matters, or when asked for, and committees are not under any obligation to report upon every proposal that is turned over to them. Hence in some state legislatures, as in Congress, matters may die in committee, that is, may be left in the committee's files without any action until the legislative session ends.

The committee system in its actual operation among the several states has displayed great merits and equally grave defects. Legislation without the aid of committees is practically impossible so long as legislatures retain their present size, for only by some such division of labor can the huge grist of bills be given any consideration at all. Where the committees are intelligently constituted the committee system means that all measures are intrusted for preliminary consideration to those legislators who know most about them. Legislators who sit on the municipal committee of a state legislature, for example, inevitably learn a good deal about city problems and may become after a while rather proficient in that field. In principle, therefore, the committee system is sound. The trouble is that too often the committees are not properly constituted, but are made up by a process of political manipulation. In other words the members are not assigned according to their own personal aptitudes but on a basis of seniority and political influence. The new member goes on minor committees; there is not much inducement to become familiar with their work, for he hopes to get

Their  
functions.

Merits  
and faults  
of the  
committee  
system  
in the  
state legisla-  
tures.

himself assigned to different and more important committees at the next session.

Too many  
commit-  
tees.

Most legislatures have too many committees. In most of them, moreover, the committees are too large. Good work cannot be done by a committee of forty members, half of whom do not attend the hearings. The distribution of work among the committees is also uneven; some are swamped with work, while others have little or nothing to do. One committee may have a hundred bills referred to it, while another gets only one or two bills during the entire session. And there is no coördination of committee work. Each committee works by itself, even where matters closely akin to the jurisdiction of some other committee are being studied.

Frequent  
disregard  
of com-  
mittee  
recommen-  
dations.

Another feature which is destructive of efficient committee work is the tendency of the legislature to disregard the reports of its committees and by its own votes to reject, without adequate reason, the decisions which committees have arrived at after prolonged discussion. It is true that in most legislatures the recommendation of a committee, particularly if it is made unanimously, carries weight; but nowhere is there any certainty that such recommendation will be accepted. Traditions and practice in this matter differ greatly among the states, but in general it can be said that the unconcern with which legislatures set aside the work of their own committees is a serious weakness in the American system of lawmaking.

Importance of  
legisla-  
tive pro-  
cedure.

The details of legislative procedure are too complicated to be set forth in brief form without the risk of serious inaccuracy. Yet this is a branch of the subject which cannot be entirely omitted from any discussion of American government, however general. The spirit and form of the laws are determined in some measure at least by the system of legislative procedure. The quality of the statute book depends thereon. Simplicity of procedure is essential to the making of good laws. On the other hand a certain amount of intricacy and formality is necessary to insure that laws shall not be made or unmade hastily, or in obedience to the dictates of prejudice and excitement. American legislative procedure has been severely criticized because of its complexity, and to the layman it does seem needlessly complicated; but lawmaking is a serious business and must be carried on under adequate safeguards. Legislative bodies, moreover,

are slaves to tradition. Once a rule is adopted it becomes almost impossible to change, no matter how useless or even pernicious it may have become. It may be set at naught, but it stays on the books. Thus the rules pile up until the task of learning them takes most of a new member's time during his first session. And when he has mastered them he usually opposes any changes in these rules, for he does not want the job of learning them all over again.

The prime purpose of legislative rules is to expedite business and thus prevent congestion. But they have not usually been successful in achieving this end. The congestion of business in many of the state legislatures, toward the end of the session, is notorious. It is not uncommon to find hundreds of bills half way through the legislature when it enters upon the last week of its session. Then there are frantic all-night sessions in the endeavor to hurry these bills through at the rate of a half dozen an hour. This congestion is largely due to the dilatory action of committees in reporting bills but it also arises from the way in which the legislature fritters away its time during the early weeks of the session. The legislature of Massachusetts has avoided most of this trouble by adopting the rule that committees must report on all bills before a prescribed date, this date being set well in advance of the close of the session.

Let us take a look at the process of lawmaking in a state legislature. Massachusetts will serve for this purpose (although its procedure is not in all respects typical), the more so because impartial students of the subject have commended the Massachusetts system of lawmaking as worthy to serve as a model elsewhere. The legislature of Massachusetts, Professor Reinsch declares, is in all respects the most responsive to public opinion of any American legislature.<sup>1</sup>

As between Massachusetts and the other states there is no great difference in the printed rules of legislative procedure; it is in the interpretation and application of the rules that the difference arises. In Massachusetts the rules are followed strictly; in many of the others they are honored by frequent suspension or evasion. Even when the state constitution requires

The  
congestion  
of business

Variety  
and uni-  
formity in  
procedure.

<sup>1</sup> P. S. Reinsch, *American Legislatures and Legislative Methods* (N. Y., 1907), p. 174. For a summary of its procedure see L. A. Frothingham, *The Constitution and Government of Massachusetts* (Cambridge, 1916), ch. vii.

that bills shall be read verbatim before final passage, or passed through their successive stages on different days, these requirements are generally evaded by some mere gesture which is set down upon the official records as a compliance in fact. Very rarely can one get a correct idea of the actual procedure by merely reading the rules.

1. The introduction of a bill.

In Massachusetts the first step in the making of a law is the presenting of a petition accompanied by a bill.<sup>1</sup> Any citizen may present a petition; and one signature is enough. Getting the bill properly drafted is not so simple, however, hence a great many measures are presented in ungainly form, with provisions crudely expressed, ambiguous in wording, and otherwise defective. The trouble is that we assume the competence of any citizen to frame a law, an assumption which may have had some warrant in early days when conditions of life were simple, but which in its application to the intricate mechanism of modern society is a gross absurdity.

Provision for bill-drafting by experts.

The proper drafting of a law requires skill and experience. In recognition of this fact most of the bills now presented to the legislature are framed by lawyers who have been employed for the purpose by civic organizations, private corporations, or individuals. Those relating to counties, cities and other municipalities are usually prepared by their own legal advisers. Some bills are also drafted by members of the legislature themselves, and in order to assist them there has been established, at many of the state capitols, a bill-drafting bureau with expert officials whose function it is to draft measures whenever requested. In connection with this, in some instances, there is also a legislative reference bureau from which members of the legislature can obtain information on any question that is being considered. These bureaus have contributed a good deal to improve the form and phraseology of state laws during recent years.

The rules of a legislature usually require that some member shall formally introduce each bill and thereby assume a technical responsibility for it. This does not mean that the member approves the measure. It is merely a way of making sure that bills are presented in good faith. A legislator will customarily

<sup>1</sup> In nearly all the other states no petition is necessary, the bill itself being sufficient.



introduce any measure when requested to do so by somebody in his own district. Bills may be introduced in either House, at the discretion of the petitioner, but must usually be filed before a certain date, otherwise they can be introduced only under suspension of the rules. There is no limit to the number of bills that any member may introduce. They come in by hundreds, or even by thousands.

When bills are introduced, they are read by title only. Thereupon the presiding officer refers each bill to an appropriate committee. Ordinarily there is no doubt as to what committee should have a particular measure. Bills relating to taxation go to the committee on ways and means; those relating to municipal affairs to the committee on cities. Those affecting the courts go to the committee on the judiciary; those relating to labor to the committee on industry, or whatever its name may be. But occasionally a measure comes forward dealing with some matter which seems to be on the border line between the jurisdiction of two different committees. Take the subject of workmen's compensation, for instance. Should a bill relating to that matter go to the committee on industry, or to the committee on insurance, or to the committee on social welfare? In such cases the assignment made by the presiding officer may be discussed by the legislators and possibly overruled. Or a compromise may be made by referring the bill to two committees sitting jointly. While awaiting consideration by a committee the measure is printed, the expense being borne by the state. No matter how absurd the bill may be, or how long its multifarious provisions, it goes into print at the public cost. The waste involved in this is considerable. In the Massachusetts legislature of 1924 more than a thousand bills were printed, with a total of about four thousand pages. At least half this printing represented a sheer waste of paper and ink. It is pretty generally agreed that some way of lessening this waste ought to be devised, but thus far no practicable plan has been found.

What happens after a bill reaches the committee? The first step is to place it on the committee's calendar and to assign a date for a public hearing upon it. When that date arrives, the hearing is held. Advocates and opponents of the measure appear and argue for or against it. In most states, if not in all of them, anybody who wants to address the committee is accorded that

2. First reading and reference to a committee.

3. The committee hearing and report

privilege, and naturally the privilege is sometimes abused. Cranks and hobby-riders come and discourse at tedious length, while the members of the committee stretch themselves and yawn.<sup>1</sup> Sometimes the hearing may take an hour or less; sometimes it may continue all day or for several days. When both sides have had their say, the hearing is closed; the committee goes into executive session and decides whether it will report favorably or unfavorably. Or the committee may postpone this decision until some convenient time several days or even weeks after the hearing is over. Indeed it may never vote on the matter at all; but in some states every bill must be sent back to the legislature with a report on it.

4. The committee's report presented.

When a committee sends back a bill with its report, favorable or unfavorable, it is listed upon the calendar of the House or the Senate as the case may be, and in due course comes before the whole chamber for reading. The committee's report is presented and it may be accepted or rejected. The chief debate takes place at this point, namely, on the question of giving the bill its second reading. If not defeated at that point, it is placed on the calendar for a third reading, and when it is again reached a further discussion may take place, although that is not customary. Having passed its third reading, it is ordered to be engrossed and then forwarded to the other chamber.

5. Second reading.

6. Third reading.

7. Passed to engrossment and sent to the Senate.

There it must go through a similar course all over again. If the two chambers have separate committees there is a further committee assignment, but if the system of joint committees is used there is no need for this. In any case the bill gets its three readings in the second chamber, with two opportunities for a debate. If no amendments are made during these discussions the measure is attested by the presiding officers of both chambers and goes forward to the governor for his signature. But any amendment, however unimportant, brings the bill back to the original chamber for concurrence, and in case the two Houses fail to agree, a committee of conference, representing both cham-

Bills in the Senate.

<sup>1</sup>A few years ago one Massachusetts legislator noticed that a dapper young man was appearing before some committee or other every few days and addressing it on matters which were not always wholly relevant to the bill under consideration. On enquiring why this young man had such a versatility of interest in legislative measures he received the answer: "Oh, I am not interested in any of these bills. I am a student of oratory and my teacher told me that this would be a good way to get practice."

bers, is named to effect a compromise if possible. This compromise is then reported to both chambers and is usually accepted by them. If the committee fails to reach a satisfactory compromise, the bill is dead, but relatively few measures perish in this way.

It will be seen, therefore, that the making of a state law is a long process. It is even longer than the foregoing outline would indicate, because reconsideration may be moved at almost any stage. Points of order may be raised and roll-calls asked for. There are almost innumerable ways of obstructing the progress of a measure. Hence important bills often take several weeks and even months in going through their various stages. Emergency measures can be rushed through in a few days, but only under suspension of the rules.<sup>1</sup>

Notwithstanding all this formality in the way of committee hearings, reports, three readings in each chamber, and frequent motions to reconsider, the fact remains that many measures go through the legislature without being even read by any considerable portion of the members. Sometimes the clerk reads every provision of the bill with nobody listening to him; sometimes the "reading" of the measure consists in placing a printed copy on each member's desk. The elaborate rules and procedure are depended upon to accomplish what can never be secured without patient study and care on the part of the legislators themselves. The result is seen in the all-too-common enactment of laws which contain "jokers"; or provisions which on careful scrutiny are not what they appear to be at the first glance. Provisions inconsistent with each other, and even ludicrous absurdities are sometimes found in bills after they have passed through all their stages. Measures are occasionally passed without enacting clauses or without some other indispensable feature. These mis-  
haps are not peculiar to any one state. They are common in

Lawmak-  
ing a  
tedious  
process.

The  
intricate  
procedure  
does not  
guarantee  
the quality  
of legis-  
lation.

<sup>1</sup> The various stages in the making of a law may be summarized in this way: (1) drafting the measure, (2) bill introduced by some member, (3) given first reading, referred to committee and printed, (4) committee consideration, hearing, and vote, (5) sent back to legislature and given second reading, (6) given third reading and sent to other chamber, (7) goes through the same process there, (8) sent forward to the governor unamended or sent back to original chamber with amendments, (9) in the latter case, if amendments are not accepted, goes to committee of conference, (10) report of conference committee adopted by both chambers and bill then sent to governor, (11) if the governor vetoes the bill it is returned and in each chamber a vote is taken on repassing the measure over his veto.

them all.<sup>1</sup> The reason is plain enough. It may surprise some readers to learn that a bill may go through three "readings" in both legislative chambers and be signed by the governor without having been actually read by anybody except the man who drafted it. If a measure is not opposed there is no debate. It is merely taken for granted that every member has read the bill and is satisfied with it. Prolonged and varied formalities are substituted for individual scrutiny. There is too much of the one, too little of the other.

Reasons  
for the  
inferior  
quality  
of state  
laws.

American state legislation has not set a high standard either in form or in substance. The popular tendency to look upon law as the remedy for all political, social, and economic evils is one fundamental reason for this. Legislation in America has been called upon to perform functions which in all other countries are turned over to administrative officials with discretionary power. The forty-eight states of the Union produce nearly thirty thousand pages of statutes every session, a large part of this enormous grist being rushed through by the use of rapid-fire methods in the closing days of legislative sessions. Small wonder it is that under such conditions a sizable portion of it should prove to be of inferior quality.

There are other reasons, too, why so many state laws prove unsatisfactory. The haphazard way in which bills are drafted, without attention to clearness or brevity, is responsible for a share of the trouble. The absence of recognized legislative leadership, due to the separation of executive and legislative organs, is another feature which has encouraged careless lawmaking. The attempt to make formalities of procedure take the place of personal alertness on the part of legislators has proved a failure. Overproduction of laws, however, is the fundamental difficulty. The legislative promoter or lobbyist who earns his living by

<sup>1</sup> A few examples :

"If any stallion escape from his owner by accident, he shall be liable for all damages, but shall not be liable to be fined as above provided."

"No one shall carry any dangerous weapon upon the public highways except for the purpose of killing a noxious animal, or a police officer in the discharge of his duty."

"All carpets and equipment used in offices and sleeping rooms of hotels and lodging houses, including walls and ceilings, must be well plastered and kept in a clean and sanitary condition at all times."

"Any seven persons, residents of the state, may organize a co-operative association with capital stock . . . provided however, that not more than one-tenth of said capital stock shall be held by any one stockholder."



buttonholing legislators in favor of one measure and against another, being paid in either case by interested outside parties, has been a contributory factor to this orgy of lawmaking. The term lobbying does not imply, as many people suppose, the use of corrupt or sinister methods. Most lobbyists do their work in the open and some of them perform a useful service in making the legislators acquainted with the facts. But there are some, also, whose ways are devious and whose tricks will not bear honest scrutiny.

Quantity production often involves a sacrifice of quality. In Indiana the legislature is forbidden by the constitution to prolong its session beyond sixty-one days. During this relatively short period it must organize, appoint committees, and deal with about a thousand bills. Of these it usually passes nearly three hundred—an average of five laws a day. Need one be surprised that work done at this speed is not always well done? Yet the Indiana legislature does its work no more hurriedly, and no more poorly than do those of most other states.

Every statute that passes a legislature affords a basis for future amendments, elaborations, or repeals. "Once begin the dance of legislation and you must struggle through its mazes as best you can to its breathless end—if any end there be."<sup>1</sup> Our social and economic conditions are steadily becoming more complicated. The task of adjusting legislation to them becomes correspondingly more difficult, requiring greater caution, sagacity, and courage on the part of those who make the laws of the land, and also requiring more efficient machinery for lawmaking. Legislators are not, however, improving in quality, nor is the machinery of legislation being greatly bettered. The trouble, therefore, is not merely on the surface but in the foundations of American state government. Its elimination calls for a considerable reconstruction, and not merely for a few minor changes.<sup>2</sup>

<sup>1</sup> Woodrow Wilson, *Congressional Government* (N. Y., 1884), p. 297.

<sup>2</sup> Books on this general subject, to which attention may well be called, are J. M. Mathews' *State Government* (New York, 1924); W. F. Dodd's *State Government* (New York, 1922); A. N. Holcombe's *State Government in the United States* (New York, 1916); P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907); Robert Luce, *Legislative Assemblies* (Boston, 1924); and H. W. Dodds, *Procedure in State Legislatures* (Philadelphia, 1918).

Quantity  
production  
and its  
results.

Conclusion.

## CHAPTER XXXI

### THE STATE EXECUTIVE

There is an obligation, inescapable, to resist all those who do not support the government. There is no right to strike against the public safety by anybody, anywhere, anytime. I am determined to defend the sovereignty of the commonwealth and to maintain the authority and jurisdiction over her public officers where it has been placed by the constitution and laws of her people.—*Calvin Coolidge.*

Organi-  
zation  
of the  
state ex-  
ecutive  
depart-  
ments.

Every state of the Union recognizes in its scheme of government the principle of checks and balances. Each state accordingly has established an executive department, independent of the legislature and possessing executive powers only. This executive department consists of a governor and various state officials. As to these state officials there is considerable variation, but most of the states have a lieutenant-governor, a secretary of state, a treasurer, an attorney-general, an auditor, and a superintendent of education. In addition every state has various other officials, boards and commissions (such as boards of health, public service commissions, and so on) whose work is said to be administrative rather than executive. Strictly speaking, the state executive is established by the constitution and endowed with independent powers, while the administrative offices have been, for the most part, created by action of the legislature and are subject to its control. But this distinction does not hold in all instances and in common parlance we usually speak of the higher offices as executive and the lower ones as administrative—without much regard to their methods of creation.

The governor is always the chief executive officer in state government. His office, indeed, is the oldest executive post in America. More than three hundred years ago, before the first colonial assembly was called into existence, the position of governor made its appearance in Virginia, and it has continued as an American political institution ever since. Each of the thirteen colonies had a governor before the Revolution; in two of them

The  
office of  
governor;  
its his-  
tory.

the office was indirectly elective, in the others it was appointive, the power of appointment resting either with the crown, as in Massachusetts, or with the colonial proprietor, as in Pennsylvania. When the colonies became states and adopted their own constitutions, they provided in every case for continuing the office of governor. In some of them the function of electing him was given to the people, but in the majority of the thirteen original states it was left to the legislature. Gradually, however, this plan of legislative election was abandoned, and to-day in each of the forty-eight states the governor is chosen by popular vote. Candidates are nominated in some states by state-wide direct primaries, but in others by party conventions made up of delegates from counties or districts. None but citizens are eligible and the customary minimum age limit is thirty years. The election is in all cases by secret ballot, and a plurality of votes is ordinarily sufficient to determine a choice. In a few states, however, a majority is required; otherwise the choice is made by the legislature. The elections everywhere are party contests; but in states where one political party is largely in the majority the real struggle for the governorship takes place in the primary.

The term of the governor is either two or four years in all the states but one.<sup>1</sup> The tendency is toward the longer term. The longer term is particularly desirable in states where the legislature meets only once in two years. Governors in nearly all the states are eligible for reëlection, and reëlections are common.<sup>2</sup>

All state constitutions make some provision for filling the governor's post in case it should become vacant during the term for which he was elected. Such vacancy may be by reason of the governor's death or through his conviction and removal on impeachment. The lower house of the legislature, following the federal analogy, has the power to begin the impeachment proceedings; the upper house as a rule hears and determines the issue. Occasionally, as in New York, the justices of the highest state court sit with the upper chamber during the trial. A verdict of conviction, which usually requires a two-thirds vote, ousts the governor from office and may disqualify him from holding

Term and  
method of  
election.

Removal  
of gov-  
ernors  
by im-  
peachment.

<sup>1</sup> It is two years in twenty-three states, four years in twenty-four of them, and three years in New Jersey.

<sup>2</sup> The exceptions include Pennsylvania and Indiana.

in the future any civil office in the state's service. As a matter of history very few governors have been brought to book in this way (only nine of them in a hundred and fifty years) and convictions resulted in only about half these cases.

Removal  
by recall.

In about a dozen states the governor may be removed from office by means of a recall election. This involves, as will be explained a little later, the presenting of a petition bearing a designated number of signatures with the request that the matter of removing the governor from office before the expiry of his full term be placed before the voters on the ballot at an election. Reasons, as a rule, must be given in the petition for a governor's recall, but they need not amount to allegations of misconduct such as would be required for an impeachment. Thus far only one governor has been removed from office in this way—Governor Frazier of North Dakota who was recalled in 1921.

How a  
vacancy  
in the  
governor-  
ship is  
filled.

When a governor is convicted on impeachment, or dies in office, he is succeeded, according to the provisions made in more than two-thirds of the states, by the lieutenant-governor. This official is ordinarily chosen for the same term as the governor and by the same process of popular election. His main function, apart from that of being heir-apparent, is to preside at sessions of the upper branch of the state legislature and in a few states at meetings of the governor's council. Failing the lieutenant-governor (or in states where there is no such officer), the succession usually passes to some designated state official such as the president of the state senate or the speaker of the lower chamber, as the constitution may provide. If a governor is removed by means of the recall, however, this order of succession does not go into effect. His successor is chosen by the people at the recall election.

The  
governor's  
powers :  
1. legis-  
lative

How the  
governor  
secures  
his legis-  
lative  
influence.

The powers of the governor are for the most part executive powers. The theory of American state government is that a governor has no legislative functions, and some of the state constitutions expressly prohibit him from exercising any. But in this case, as in so many others, the practice of government has run away from the theory. The governor's participation in law-making is, in fact, very extensive and very active everywhere—no matter what the constitution permits or prohibits. No one who is familiar with the actualities of state government can harbor any doubts on that score. The governor initiates legisla-



tion, promotes it, often pushes it through both chambers by the weight of his official influence, and signs it after it has passed. He is at all times potentially, and much of the time actually, a participant in all stages of the lawmaking process.

Now why is there this flagrant contradiction between the theory and the practice of state government? The constitution of Massachusetts, for example, declares that "the executive shall not exercise legislative or judicial power or either of them," yet every governor of that commonwealth proposes laws, actively urges them, uses his influence to ensure their passage, and then signs them. What is all this but the "exercise of legislative power"? The reason may be found in the close relation which exists in the states, as in the nation, between lawmaking and the party system. Members of state legislatures are almost invariably elected on a party basis, pledged to carry out a program of legislation set forth in the platform of their party. As a rule, though of course not always, the governor is a leader of the party which controls a majority in the legislature. When, therefore, the governor insists that some particular measure be passed or another one rejected, he does not speak as the executive head of the state government alone but as the leader of his party in the state. His recommendations may be communicated to the legislature by means of official messages, or informally by conferences with prominent members of his own party in the legislative chambers. The latter is the way in which the governor usually exercises most of his influence upon lawmaking. Outwardly he may appear neutral, while day by day in his private office he is pulling every string to achieve his end.

His influence as a party leader.

Members of the legislature are always under the spell of a governor's influence to a considerable extent. They are interested in appointments which the governor has power to make; they are interested in the passage of bills which will come before him for assent or veto; they are interested in appropriations which he may or may not recommend. By the strategical use of his discretion in these matters a governor can, if he so desires, persuade many members of the legislature into sympathy with his own legislative policy. No legislator wants to fall out with a governor of his own party if he can avoid it. So the governor usually gets what he wants from the legislature if he goes after it with enough determination—not always, of course, but usually.

The spell of his influence with individual legislators.

And if the worst comes to the worst he can appeal unto Cæsar. He can appeal to public opinion, in other words, and put pressure upon the legislature in that way. He can call a special session, send the assembled legislators a special message and thus compel them to go definitely on record for or against his proposals. Therein he has a great advantage, for his own mind is unanimous whereas that of the legislature is not. He can also get more publicity, and better publicity, for his side of the issue. At any rate the governor's activity in lawmaking, his legislative power, is not founded upon constitutional theory but upon the logic of facts. If you desire to know how extensive this power is, do not seek to discover it by reading the state constitution: watch the legislators flitting in and out of his ante-chamber, and then listen to what they say on the floor. You will soon realize what is meant by executive activity in lawmaking.

The old  
fear of  
executive  
tyranny.

The framers of the thirteen original state constitutions were much afraid of executive tyranny. This fear, of course, was a legacy from colonial days when the governor had to carry out the instructions which came to him from England and hence obtained a reputation for high-handedness which was not of his own making. So the original constitutions reduced the governor's office to one of relatively small importance, making the legislature the predominant arm of the government in all the states. As Madison expressed it during the debates in the federal convention of 1787: "The executives of the states are in general little more than ciphers; the legislatures omnipotent." But if they were "ciphers" at the outset, the governors did not long remain so, and they are assuredly nothing of the sort to-day. The governor's positive share in legislation is very considerable everywhere, and it is steadily growing.

The  
governor's  
veto  
power:  
its origin  
and devel-  
opment.

Nor is the governor's influence over the course of state legislation confined to positive channels. Like the President he also possesses, by express constitutional provision, that effective weapon of legislative obstruction known as the veto power, the power of withholding his assent to bills passed by the legislature and thereby preventing their enactment into law. This veto power now exists in every state except North Carolina. It was not given to the governor in most of the original thirteen state constitutions for the reason that it seems to be too despotic a power to be placed in the hands of any one man. But having

been adopted in the federal constitution of 1787, the executive veto gradually gained in public favor, and one state after another adopted it during the course of the nineteenth century.

In principle and in practice the governor's veto power and the veto power of the President are much alike. With a few minor exceptions every bill or resolution which passes both houses of the state legislature must be presented to the governor for his signature. Like the President he has three options: he may sign it, or within the prescribed period send it back without his signature, or do neither. In the first case it becomes a law. In the second case it does not become a law unless both houses of the legislature, by a prescribed majority (usually two-thirds or three-fifths) pass the measure over his veto. In the third case, at the expiration of the prescribed time, from three to ten days, it becomes a law without the governor's signature, provided the legislature does not in the meantime end its session, in which case it does not (in some states) become a law but receives the "pocket veto."<sup>1</sup>

How the  
veto  
power is  
exercised.

During the session a governor has a relatively short time in which to make up his mind whether he will sign or veto a measure—from three to ten days. This is usually long enough when bills come to him one at a time. But in the closing days of a session they come to him by the dozen, even fifty or more of them in one batch. It is impossible for any governor to examine them all in the period which is ordinarily allowed. So, many of the states provide that the governor shall have a longer time, sometimes as much as thirty days, within which to sign or veto bills after the legislative session comes to an end. This is a sensible provision and one which all states ought to make—unless they reduce the congestion in the closing days of the legislative session. The latter is the real root of the difficulty.

In many of the states the governor cannot veto particular clauses or sections of a measure, but must sign or reject it as a whole. In the case of appropriation bills this is a serious draw-

The power  
to veto  
parts of a  
measure.

<sup>1</sup>The "pocket veto" is a feature in twenty-one states; but not in the remaining twenty-seven. In five of the latter, if the legislature adjourns before the time for the governor's consideration has expired, the governor may veto the measures and send them back at the beginning of the next session, otherwise they become laws; in the remaining twenty-two states the legislature, by adjourning within the time-limit, automatically kills all bills which the governor does not subsequently approve.

back to the effective exercise of the veto power, for a governor is often faced with the alternative of letting an objectionable item of expenditure pass or of tying up the entire list of appropriations. In some states the veto of individual items is permitted, and this, it has been found, not only enhances the authority of the governor in the determination of the state's financial policy but places upon him a corresponding responsibility for the economy of his administration. On the other hand the practice of giving the governor power to strike out, or reduce, individual items in an appropriation bill is not without its practical disadvantages. It encourages the legislators to put into these bills all sorts of local favors for their own districts and then let the governor bear the odium of striking them out or cutting them down.

Workings  
of the  
veto  
system.

Executive vetoes have been much more frequent in state than in federal government. They are much more common in some states than in others, being naturally most numerous where the governor has power to reject individual sections or items in bills. Something also depends upon the relations between the governor and the legislature as respects their party affiliations. A governor uses his veto power more freely upon a hostile legislature than upon one which his own party controls. Yet the entire number of measures vetoed in whole or in part is but a small fraction of the total number which comes to the governor's office for approval, probably not more than ten per cent on the average for the whole country.<sup>1</sup>

The restraining influence of the governor is not to be accurately measured, however, by merely counting his actual vetoes. A hint from the governor's office that some measure, if passed, will not receive the executive signature is often quite sufficient to prevent its further progress in the legislature. Senators and assemblymen who are in charge of measures during their passage through the legislature often enquire from the governor what his attitude is likely to be and are told that changes must be made or a veto will be forthcoming. Thereupon they frequently bestir themselves to get their bills amended before final enactment. Occasionally a measure is recalled by the legislature for some amendment after it has gone to the governor's desk but before

<sup>1</sup> Sometimes, and in some states, it goes as high as twenty or even twenty-five per cent; in other states it drops almost to nothing.



he has acted upon it. When the governor vetoes a bill his action may be overridden by the legislature if sufficient votes can be mustered, but in most cases they cannot be secured and the veto stands.

This means that governors have obtained, through the use of their veto power, a degree of influence over the course of legislation which they were not originally intended to have. The veto power was given to the executive, in the first instance, as a weapon of defence, as a shield against possible assaults made by the legislature upon executive independence. It was not assumed that a governor would veto measures whenever they merely happened to run foul of his own personal preferences. It was not intended that the governor should constitute himself a third house of the state legislature, as he has often done in recent years. Least of all was it anticipated that governors would take upon themselves the function of deciding whether laws are unconstitutional and of vetoing them when they seem to be so. This function was intended to belong to the courts. Yet governors often veto measures on the ground that they are of "doubtful constitutionality," or merely inexpedient, or extravagant, and sometimes without giving any very definite reason at all.

How its use has increased executive influence.

So the governors have become factors in lawmaking, very influential factors. Nevertheless their chief duties are executive, not legislative. It is to executive work that they devote their principal attention, which is what the state constitutions intend that they shall do. This executive work is extensive and varied, but most of it can be grouped under seven heads, namely, (1) appointments and removals, (2) the general oversight of state administration, (3) financial functions, (4) military functions, (5) duties in relations to the federal government and to the other states, (6) the granting of pardons, and (7) miscellaneous.

The governor's executive powers:

The appointing power of the governor is great, and it is steadily growing. Many state constitutions stipulate that the governor shall appoint certain designated officers and "all others whose appointment or election is not otherwise provided for." Time was when most of the higher state officials were chosen by the legislature, but now very few are selected in that way. The practice of choosing officials of state administration by popular election attained considerable vogue during the nineteenth cen-

1. The appointing power.

ture and still has a strong grip in many states as respects the executive officers; but in many others the administrative posts, or most of them, are now filled by persons whom the governor appoints.<sup>1</sup> This is particularly true of boards which have technical tasks to perform, such as boards of public instruction or public service commissions. In the exercise of his appointing power, however, the governor is usually subject to limitations, that is to say, his appointments are not valid until confirmed. The confirming authority is ordinarily the upper chamber of the state legislature; but in exceptional cases, as in Massachusetts, it is the governor's council.

Checks  
upon the  
appointing  
power :

(a) confir-  
mation  
by the  
Senate.

This practice of subjecting the governor's appointments to confirmation is one that harks back to the days of implicit confidence in the principle of checks and balances. Fearing that "one-man power" was dangerous, and that governors would abuse their authority the makers of state constitutions put restraints upon it. In many cases the requirement of confirmation has proved a wholesome check upon governors who would fain have repaid their own personal or political obligations by giving their supporters a lodgment upon the public pay-roll. It has availed at times to prevent governors from using their patronage as a means of building up personal and political machines. But just as frequently, on the other hand, the requirement of confirmation has been used to balk a governor's plans for improving state administration by the appointment of honest and capable officials. The confirming power is a bludgeon which a partisan state senate can hold over the governor's head. By its use the governors have often been forced to withhold vetoes or to recommend expenditures in which individual senators were interested. Whether there have been more examples of wholesome restraint or wilful intimidation is hard to say. With the right sort of a governor no such check is needed; with the wrong sort no such check usually avails to keep him from bargaining his appointments through. The outstanding defect of the system is that it permits an evasion of responsibility for appointments. In municipal government the power of confirmation, which remained for many decades in the hands of aldermen or councillors, has been generally abolished, all responsibility for

<sup>1</sup> In the case of those heads of departments whose positions are established by the constitution, however, popular election is still the general rule.

appointments being thereby concentrated upon the mayor. The results have been advantageous.

The other common check upon the governor's appointing power is the civil service system, which exists, however, in only one-quarter of the states.<sup>1</sup> The restrictions provided by the civil service laws, in states where such laws have been enacted, do not cover the heads of departments and other high officials of state administration. They apply to subordinate appointments only. Where there is a civil service or merit system the governor does not have entire discretion as regards these minor positions. They are filled by appointment from "eligible lists" which are prepared as the result of examinations held under the auspices of a civil service board or commission. These examinations are usually open only to residents of the state, and an eligible list containing the names of those who stand highest is then certified to the head of the department in which the position is to be filled.

(b) civil  
service  
rules.

As a practical scheme of selection the merit system is an undeniable improvement over the old method of distributing paid offices among the party stalwarts as a reward for political services. It has closed the door to one of the most pernicious traditions in American political life, that of degrading the public service to a plane of indolence, inefficiency, and arrogance in order that the obligations of party leaders may be defrayed from the taxes of the people. It is a system based upon the principle that merit alone should be the passport to public as to private employment, and that political or personal favoritism should not outweigh ability, character, and experience in determining the choice of the state's employees. It has raised the dignity of the public service and established security of tenure.

The  
principles  
of the  
civil  
service  
system.

Yet the merit system has not entirely fulfilled the high hopes that were based upon it. Everywhere there is bitter opposition to it—and not from the politicians alone. There are various reasons why it has not been an unalloyed success; the first of these reasons is inseparable from the "examination" method in whatever form it may be used. The civil service authorities have had to use examinations. Written and oral tests have been their chief reliance, supplemented of course by information

The discrepancy  
between  
its ideals  
and its  
actual  
achievements.

<sup>1</sup> California, Colorado, Illinois, Kansas, Louisiana, Maryland, Massachusetts, New Jersey, New York, Ohio, and Wisconsin.

secured in other ways as to the merits of candidates. But formal examinations, as every teacher knows, are very un dependable agencies for testing personal merit. They are poor tests of such qualities as initiative, industry, honesty, tact, patience, resourcefulness; yet these are qualities which spell success in public as in private employ. The only thing that an examination really measures is the ability of the candidate to pass that particular examination.

Could  
intelligence  
tests  
be used?

It has been suggested that intelligence tests, such as were used in the army during the war and are now being utilized in many industrial establishments, might be profitably substituted for the customary civil service examinations. But the science of intelligence-testing is still in its infancy and must be further developed before any such substitution can be safely made. It has also been suggested that the civil service boards should be transformed into "personnel departments," analogous to those maintained by some of the large industrial corporations, with power to make their selections from among candidates by a variety of methods,—formal examinations, intelligence tests, personal interviews, testimonials from former employers, and so on.

Obstacles  
to the  
merit  
system.

The merit system in the various states has encountered many other obstacles of a practical sort. It has been sometimes administered by unsympathetic or even hostile boards. Legislatures have interfered in some instances by providing that former service men must be placed at the head of the eligible lists, no matter what their qualifications. This creation of a privileged order is unfair and undemocratic; it has had a depressing effect upon the whole merit system. Finally, it is too often the unambitious and ill-equipped who become candidates for positions in the classified service. Most capable and vigorous young men and women are not looking for minor government jobs; they are aiming far higher. At any rate it is sometimes difficult to select, for the eligible list, a single first-class appointee from a whole roomful of applicants. The general tendency of the civil service system, in its actual workings-out, has been to draw into the public service a sluggish stream of men and women who have diligently prepared for the examinations and who pass them for that reason rather than by reason of their native ability. It has not raised the efficiency of public service to that of private employment.



The civil service system would bring better and more enduring results if its principles and methods were carried further. Merit should determine not only appointments but promotions. Thus far, however, it has had relatively little to do with the latter, and hence there is little incentive to do good work after a man or woman has entered the lower ranks of the public service. Promotions continue to be made, for the most part, on a basis of seniority, political influence, or the personal favoritism of department heads. The employee who works hard and intelligently has no certainty of going ahead any faster than the one who does as little as he can. Some system of promotion based upon efficiency-ratings ought to be devised, but although several attempts have been made in that direction none has proved altogether successful. General merit, or what the army ratings called "general value to the service," is something that cannot be measured by any inflexible mechanism. And if you make the mechanism flexible you will find that personal or political favoritism at once begins to creep in, disguised as official discretion.

Promotions.

With the power of appointment goes the power to suspend or to remove state officials. Authority to suspend an official from office appertains to governors in most of the states, but governors do not, as a rule, have any free power to dismiss even those officials whom they themselves appoint. Charges must usually be filed, hearings given, and in many states the concurrence of the upper chamber of the state legislature is required. Here, again, the restriction has often availed to forestall arbitrary and unjust removals, but quite as often it has served to keep in office men of political influence whose malfeasance or negligence amply warranted dismissal. When officials are appointed under civil service rules, moreover, they may be removed only by compliance with such formalities as the laws prescribe. These usually afford adequate protection against dismissal save for reasons of actual misconduct or gross inefficiency.

Removals.

Second, the governor is charged with a general supervision over the enforcement of the laws and the conduct of the state's administrative affairs. Just how much actual authority he can exercise in this capacity depends in part upon the personality of the governor and in part upon the nature of his legal relations with other state officials. A dominating personality in the gov-

2. The general oversight of state administration.

Functions  
in this  
sphere  
compared  
with those  
of the  
President.

ernor's chair, if he have public opinion as an ally, will often compel all other state officials to help carry out his policy, no matter how independent of his actual control they may be. Yet the governor's executive supremacy in most states is far from being so complete as is that of the President in national affairs. It is here, more than at any other point, that the analogy between the two positions fails to hold. The President appoints all the heads of federal departments and can remove them at will. His control over them is unquestioned and his responsibility for their actions is not to be evaded. But the heads of state departments are not in most cases chosen by the governor and cannot be removed from office by him. His influence over their actions can only be indirect and imperfect, nor can entire responsibility for the conduct of state administration be properly allotted to him, although public opinion too often puts the blame upon him when things go wrong. Heads of state departments not infrequently set themselves out to thwart the governor's plans; they intrigue with the legislature against him and at times openly defy instructions.<sup>1</sup> Nothing of that sort is encountered at Washington.

3. Finan-  
cial  
powers.

Third, the governor has been acquiring in some of the states, financial powers of great importance. Until two or three decades ago the annual appropriation bills were drafted, in almost all cases, by committees of the legislature. They were put through one by one and not in the form of a consolidated budget. But more recently the movement for reform in the making of appropriations has gained great headway and many of the states (as will be shown in the next chapter) have installed a regular budget system. In most of these states, moreover, the function of preparing the annual budget and of transmitting it to the legislature has been given to the governor or to some official under his control. But more will be said on this topic a little later.

4. Military  
powers.

Fourth, the governor has certain military powers, but these are not now so extensive as they used to be. Nominally he is commander-in-chief of the state militia or national guard. His

<sup>1</sup> In New York State, for example, there are 29 administrative positions which may be said to be of prime importance. Of these 14 are filled by popular election or by the legislature, hence the incumbents are outside the governor's control.

functions, however, are determined by law, and for the most part they are actually performed by an adjutant-general or some similar officer. As commander-in-chief of the militia the governor may appoint officers unless the constitution directs differently, or the legislature makes some other provision, as it often does. Each state has a body of laws relating to the organization of its militia, and these laws, like all other laws, are for the governor to carry out according to their tenor. When the state militia is mustered into the national service, the governor ceases to have anything to do with it, and even in time of peace the authority of the federal war department is now very extensive, having been made so by the national defence act.

Usually the state constitution and laws authorize the governor to call out the militia in time of riot or other civil disorder. This may be and commonly is done on the request of the mayor or other executive authority of the municipality in which the disturbance has arisen, but governors as a rule have the right to act upon their own initiative as well. When the aid of federal troops is required by any state to quell internal violence, the governor may call upon the President of the United States for this assistance, provided the state legislature is not in session. If it be in session, the legislature by resolution makes the request for federal troops.

Fifth, there are gubernatorial powers and functions in relation to the federal government and the other states. The governor has become the recognized medium of official intercourse between his own state and the federal authorities. When the national government has anything to say to the states it communicates with the governors. While no specific constitutional obligations are imposed upon the governors in the way of assisting the national government to perform any of its functions, the practice is to call upon them when occasions arise. During the civil war President Lincoln asked the northern governors to assist in organizing the Union forces, and they promptly responded. Again, in the work of raising the national army during the world war the governors were asked to recommend persons for service upon the various draft boards, and in all cases complied readily. The governor is also the channel of official communication between his own state and other states. His functions in relation to the extradition of fugitives from justice have been

5. Functions in relation to the federal government and to other states.

already referred to.<sup>1</sup> When one state desires to sue another in the Supreme Court, a statute authorizing the suit is usually passed by the legislature; but the governor is regarded as having authority, on his own initiative, to institute any such suit for the protection of his state.

6. The power of pardon.

Sixth among the governor's executive powers is the power to pardon offenders who have been convicted in the state courts. But he does not now possess this power in all the states. In most of them the pardoning power still rests with him alone, but in others his authority has been limited by the requirement that he must act in conjunction with a board of pardons or with some such body. In a few states the entire power is given to a board of this sort, the governor being sometimes a member of it. One reason for limiting the governor's discretion in matters of executive clemency is the fear that the power may be used by a governor for personal or political ends. Some governors, indeed, have used it too freely and at times unwisely. In only one state, Connecticut, is the pardoning power vested in the legislature.

7. Miscellaneous powers.

Finally, the governor has a considerable range of powers which must be called miscellaneous because no other designation will cover them. He issues the order for a special election when a vacancy occurs in the legislature; he appoints a United States senator if a vacancy occurs when the state legislature is not in session (provided it has authorized him to do so); he is ex officio a member of various state boards and commissions; he attends a large number of official functions, receives distinguished visitors who come to the state capital, reviews parades, signs documents by the hundreds, holds conferences with party leaders, listens to applicants for appointments (and to their insistent friends), attends a conference of all the governors once a year, and makes a speech somewhere every few days.

A hard office to fill.

It goes without saying that the office of governor is a difficult one to fill. It demands sound judgment, a steady head, and unrelenting industry. He who holds the post is much in the public eye and continually under the fire of criticism from the opposing political party. He is expected to do the work of three or four men and to achieve results which, owing to the division of authority between himself and the legislature, are not always

<sup>1</sup> Above, p. 446.



within his power to secure. He is blamed when things go wrong—often when the blame does not belong to him. Few governors go out of office without their popularity diminished. All of them, it may be suspected, cherish the ambition to attain higher political honors and not a few (although by no means the majority) have done so. Yet Hayes and McKinley of Ohio, Cleveland and Roosevelt of New York, Woodrow Wilson of New Jersey and Calvin Coolidge of Massachusetts—six Presidents out of the last eleven—were governors of their respective states before going into the White House.

When one surveys the office of governor in its origin, its development, and its present status, there can be no question that it has greatly increased its powers during the past hundred years. In the early days of the Union the post was one of dignity and honor. But the influence of the governor upon legislation, his patronage in appointments, his financial functions, and his power as a party leader were all of them far less extensive at that time than they are to-day. During the intervening years the actual powers of the state governor have everywhere been steadily increased, but curiously enough, this has not correspondingly enhanced the dignity of the governor's position. Men willingly leave the governor's chair to become United States senators nowadays; it was not so a century ago. Professional politicians, without administrative capacity, often worm their way to this highest of state offices and make a mess of things there. Within the last ten years we have had some impressive illustrations of gubernatorial incompetence, stupidity, and even corruption. There was some expectation that the plan of nominating candidates by a state-wide, direct primary would improve the quality of governors as a class, but there is no indication that it has really done so.

Changes  
in the  
prestige  
and  
powers  
of the  
governor  
during the  
nineteenth  
century.

## CHAPTER XXXII

### STATE ADMINISTRATION

The most conspicuous sign of the new age has been the increase in the number of separate state administrative agencies. A less conspicuous but more important sign of the new age has been the increase in their powers.—*A. N. Holcombe.*

The original administrative officers.

At the first establishment of state government in America there were, in addition to the governor and the lieutenant-governor, a small number of administrative officials, notably a secretary, a treasurer, and an attorney-general. Frequently these officials, with some additional elective members, formed a governor's council, an institution which still survives in a few states of the Union.<sup>1</sup> The officers had the general duties which their titles indicate. The secretary kept the official records, the treasurer served as custodian of the public funds, and the attorney-general prosecuted suits in the name of the state. Almost invariably they were elected by the people and hence were not accountable to the governor.

Their multiplication in recent years.

By and by other officials were added to the list and chosen in the same way, an auditor or comptroller, a superintendent of education, a commissioner of labor, and so on, each at the head of his respective department. Then, likewise, with growth in population and with the consequent development of both social and economic problems, still other administrative departments were established, sometimes headed by a single state official, sometimes by a board of three, five, or more members. This development, which has led to an almost complete disintegration of state administrative functions, is largely the product of the last thirty or forty years. In all the larger states these officials and boards have multiplied to formidable proportions, and in some of them the total number of separate administrative agencies has now reached sixty, eighty, one hundred,—in one case almost two hundred.

<sup>1</sup> In Massachusetts, Maine, New Hampshire, and North Carolina.

The changing relation between government and business has been partly responsible for this elaboration of administrative machinery. The era of laissez-faire, of official non-interference in business enterprises, has been rapidly passing away. Banks, other financial institutions, insurance companies, railroad, express, telegraph, telephone, lighting, street railway, and other public service corporations have been brought within the provisions of regulatory laws. To enforce these legal regulations it has been necessary to establish boards and commissions of all sorts. Laws relating to the conditions and hours of labor, especially for women and children, laws relating to sanitation in industrial establishments, laws providing for workmen's compensation, for minimum wage scales in certain employments, for the adjustment of labor disputes, for the care of immigrant workers, for the protection of wage-earners against loan-office extortion,—all this legislation has been crowding its way to a place upon the statute books during the past generation. These have also brought in their train a host of new administrative agencies such as state bureaus of labor, industrial accident boards, minimum wage commissions, and so on. The public insistence on social-welfare legislation moreover, has put many new regulatory laws on the statute book—and such laws almost always demand new machinery for their enforcement. A law relating to motion pictures, for example, becomes father to a censorship board; a law relating to fire prevention makes a job for a fire prevention commissioner. Massachusetts, a few years ago, adopted a law to regulate boxing bouts—and a “boxing commission,” appointed by the governor, was forthwith added to the administrative machinery of the commonwealth.

Reasons  
for this  
develop-  
ment.

Apparently all regulatory laws beget officials and boards. Such laws would be relatively futile unless they possessed this fecundity. For the boards serve a dual purpose. First, they see to it that the detailed and intricate provisions of the laws are carried into effect; they receive complaints and adjust them; they prosecute violations. Second, they provide the legislature, when it undertakes any new step in the way of regulation, with a repository of information. It is absolutely impossible to incorporate in any law specific provisions for every case that may arise. Hence the legislatures try to make the general provisions broad enough and then leave their specific application to

Why regu-  
lation  
increases  
adminis-  
trative  
machinery.

men appointed for the purpose. In a word, the strict insistence upon a government of laws has given way under the pressure of problems which cannot be solved by a government of that sort.

The lure  
of the  
payroll.

But there is another reason why the machinery of state administration has become so extensive, with its far-flung array of officials and boards, commissions and commissioners, bureau chiefs, directors, deputies, superintendents, inspectors, and what not. Every new agency provides some jobs, and job-hunting is the favorite recreation of the politicians. It is well-nigh treason to his friends for a legislator to vote against any proposed inflation of the public payroll. Administration grows, moreover, by what it feeds on. More administration calls for more administrators; then the additional administrators devise more work and call for still more help. A new state department usually begins in a small way—with just one official or a small unpaid board. A little six-by-ten office in an unfrequented corner of the state capitol is its initial headquarters. But not for long. The fledgling board decides that it must justify its existence by finding work to do. And having found more work it asks for more power, more money, more office-room, more help. In a few years it has spread over a whole wing of the capitol; it has clerks and stenographers by the dozen and is spending money like a profligate.

The  
general  
alliance  
against  
deflating it.

Just try to halt this expansion and what will you find? At once the officials and employees of the department mobilize all their political friends, and the friends of their friends, to prevent any interference. Other departments realize that their turn may come next, and they hasten to the rescue. Wires are pulled from all directions until every member of the legislature is importuned not to interfere with the useful work which the department is doing. As for your proposal to compel a halt—the only people interested in it are the taxpayers and they won't take the trouble to attend legislative hearings.

Present  
depart-  
ments  
of state  
adminis-  
tration:  
1. General  
adminis-  
trative  
depart-  
ments.

In most of the states the administrative departments are so numerous that they almost defy classification. The greater portion of them can be grouped, however, according to the principal functions which they perform. First, there are various officials and boards having to do with general administration—executive officials they are often called. Among these are the secretary of state, the treasurer, the auditor, the attorney-general, the



election board, and the civil service commission, each of which departments performs functions designated in part only by its title. The secretary of state not only keeps the official records, but is intrusted with many other functions such as the distribution of public documents, the custody of the state seal, and sometimes with various duties relating to elections. The treasurer is the custodian of the revenues; he also pays out the money when authorized by the proper authority. Likewise he issues bonds when the state borrows. The auditor or comptroller must approve every bill before the treasurer will pay it; he also checks up the treasurer's books and reports regularly to the legislature. The attorney-general is the chief prosecuting officer of the state, but he also acts as legal adviser to the governor, the legislature, and all other state officials. In some states he has a certain degree of supervision over the work of district prosecuting attorneys. Election boards, where they exist, control the machinery of polling, but usually do this through local election officials. When there is a civil service commission, it supervises the administration of the laws relating to the merit system of appointments, holds the competitive examinations, and protects the public service against the evils of patronage. This does not exhaust the list, moreover, of departments which have to do with general administrative matters. In many states there are other officials and boards of this character.

Their  
functions.

A second group of state departments includes all those which have to do with sanitation and public health protection. Nearly every state has a department or board of health whose duty is to carry out the provisions of laws relating to the collection of vital statistics, the prevention of disease, and the protection of the public against epidemics. Usually this department has some degree of supervision over the work of local health boards or officials. The laws and regulations relating to the protection of the public health have become numerous and complicated in all the more populous states; they cover a host of matters, such as the registration of births and deaths, the reporting of contagious diseases, disinfection and quarantine, the disposal of sewage and garbage, the protection of water supplies, the inspection of food, especially of meats and milk, the abatement of nuisances, and the amelioration of unsanitary conditions in shops and dwellings. The drift towards central supervision in

2. Public  
health  
and sani-  
tation.

public health administration has been strong during recent years. Individual communities are no longer left to make and apply their own capricious regulations in this vital field.

3. The regulation of public utilities.

For many decades it was the policy of the states to let public service companies of all sorts go unregulated except in so far as general regulations could be prescribed by law. Administrative machinery for enforcing even these general regulations was entirely lacking. The result was that many large corporations, particularly those engaged in furnishing water, gas, electricity, or transportation, abused their power and enriched themselves by fleecing the public. Then the states woke up and not only stiffened the regulations but established boards to supervise the corporations. Within this category of supervising bodies there are commissioners of corporations, water power boards, railroad commissioners, and public service commissions. In practically all the states regulating bodies of this sort now exist. Their functions are so multifarious that anything akin to a complete summary of them would be impossible here. Some of these boards are endowed with large powers to hear complaints and adjust them, to make rules on their own initiative, to pass upon the reasonability of rates and conditions of service, to compel the submission of financial reports, and to enforce compliance with their orders. Others have varying degrees of lesser authority, and some have powers of an investigating and advisory character only. Everywhere, however, the powers of such administrative officials and boards are expanding and becoming yearly more effective. Their work constitutes a highly important phase of state government but it is not always competently performed. This is largely because many of the appointments to regulating boards have been purely political.

4. The regulation of banking and insurance.

Two branches of corporate activity which have become subject to increasingly strict supervision in recent years are banking and insurance. To compel sound financial methods in both these fields the various state legislatures have passed elaborate laws, and to be sure that these laws shall be strictly carried into effect many of them have established departments of banking and insurance. These departments are in charge of commissioners who have power to examine the books of all insurance companies and banks which do business under state charters, to audit their accounts, to make sure that their investments are in

legal securities, to insist upon adequate allowances for depreciation, and in general to insist upon conservative financial management.

During the last few years some of the states have been extending their supervisory activities to the business of selling bonds and shares as well as to banking and insurance. The rules of supervision are embodied in the so-called "blue-sky laws" and usually provide that no stocks or bonds may be offered for sale to the public until adequate information concerning the tangible assets behind them has been laid before the bank commissioner or some other state authority, and a permit obtained from him.<sup>1</sup> The issuing of this permit does not mean that the bonds or stock of a corporation are recommended to the people for investment or that the state vouches for the solvency of the companies concerned.

Until about half a century ago the amount of state control over ordinary industrial and mercantile establishments was relatively small. Factories and shops were considered to be outside the proper range of government regulation. But this policy of laissez-faire has been rapidly passing into the discard; the state no longer concedes the right of manufacturers and merchants to do as they please in their own business—particularly as regards their relations with their employees. During the past twenty-five years more especially, there has been a flood of laws dealing with sanitary conditions in industrial and mercantile establishments, with the hours of labor, with workmen's compensation, minimum wages for women and minors in industry, with the employment of child labor, with safety appliances, with the arbitration of labor disputes, and with a great host of allied matters.

These laws have required, for their administration and enforcement, an additional array of officials, boards, and commissions. Most conspicuous among them are commissioners of labor or labor boards whose duty it is to investigate industrial conditions, to enforce the laws relating to the employment of women and children, to see that factories are regularly inspected as to their sanitary arrangements and their proper equipment with

5. The regulation of industry.

<sup>1</sup>The term originated in Kansas, where the first law of this sort was enacted in 1911. The implication was that many mining, gas, oil, and land companies were issuing bonds and shares upon assets no more tangible than the blue sky.

safety devices, to eliminate the evils of sweatshop production, and in many cases to mediate in disputes between employers and employees. In a few states this last named function is intrusted to a special state board of arbitration or conciliation. Provision for the compulsory arbitration of labor controversies does not yet exist, however, in any of the states.<sup>1</sup>

Workmen's  
compensation  
laws and  
their admin-  
istration.

The passing of workmen's compensation laws in nearly all states, moreover, has necessitated the establishment of special boards for the detailed administration of these statutes. They are called industrial accident commissions or workmen's compensation boards. The principle at the basis of these laws is that when an employee is injured in the course of his work the burden should not be placed wholly upon himself, or upon his family, or even upon the employer; it should be included in the cost of production and thus borne by the entire consuming public.<sup>2</sup> Employers are therefore being compelled to insure their workmen against the industrial accidents which inevitably occur in most occupations. They are expected to set down the cost of this insurance as one of their regular items of expense like taxes or fire insurance or the replacement of machinery. When machines break down, the employer repairs the damage and charges the cost to the consumer of his product. But men break down as well as machines. Over 75,000 persons are killed, and several times as many are injured, in American industries every year. It is the intent of the workmen's compensation laws that this damage shall be taken care of in the same way. Industrial accident boards are established by the state to supervise the details, to decide the amount of compensation to be paid, and how it

<sup>1</sup>In 1919 the legislature of Kansas passed a law establishing in that state an industrial court, its judges appointed by the governor, with power to settle all industrial disputes of whatever sort in "essential" industries, that is, in industries affecting food, clothing, fuel, and transportation. The decisions of the court were made binding upon both employers and workers. But this experiment was partially wrecked by the action of the United States Supreme Court in declaring certain provisions of the Kansas act to be in conflict with the fourteenth amendment. Sec. 262 U. S. 525 (1923).

<sup>2</sup>The common law gives the workman redress only when the accident is due to the fault or negligence of his employer. It gives no redress when the injury can be shown to be due to his own negligence or to the negligence of a fellow-workman. And even when the workman was entitled to be compensated he could obtain his redress (prior to the passing of the compensation laws) only by bringing suit in the regular courts and this was always an expensive procedure.



shall be paid. Some states allow the employers to insure with private companies; others require them to do it through a state bureau of insurance.

The constitutionality of workmen's compensation laws, in that they virtually require an employer to insure his employees against the results of their own negligence, has been attacked in the courts. In a famous decision, rendered in 1913, the New York court of appeals declared that this requirement involved a deprivation of liberty and property under the New York constitution and was not justifiable as a reasonable exercise of the police power.<sup>1</sup> This decision drew forth much criticism, and an amendment was accordingly added to the New York constitution expressly permitting the legislature to enact a compulsory compensation law. To-day the constitutionality of such legislation is generally conceded.

Their  
constitu-  
tionality.

Minimum wage laws have also been passed in some states, and such action usually adds another to the list of state commissions. The function of a minimum wage board is to investigate the rates of wages paid to women and minors in factories or stores and to recommend (in some cases to compel) the payment of a minimum weekly wage. The argument is that society as a whole cannot safely permit large bodies of women and children to be employed at rates which are below the normal standard of living; for if such conditions are tolerated, the ultimate cost in crime, poverty, disease, and immorality will fall upon the whole community. Where women and children are overworked, underpaid, and underfed, the community as a whole is bound to suffer. That is an inexorable law of social evolution. Better it is, therefore, that the consumer should pay higher prices for goods than that he should pay less for what he buys and then make up the difference (yes, more than the difference) in taxes for the support of jails, reformatories, poorhouses and other institutions which draw so many of their recruits from the derelicts of industry.

Minimum  
wage  
laws.

Various forms of social insurance are now under discussion in some of the states. If these are adopted, they will inevitably require the establishment of some more administrative departments. Proposals for compulsory health insurance, for a system of old age pensions, and for insurance against unemploy-

The  
pending  
pro-  
grammes  
of social  
insurance

<sup>1</sup> *Ives v. South Buffalo Railway Co.*, 201 N. Y., 271.

ment are now being considered with varying degrees of seriousness, and the time is not far distant when some or all of them will be carried into effect. The United States is now the only great industrial country which does not have a system of old age pensions. That situation, obviously, will not continue permanently. Health insurance has also been established as a public enterprise in the chief European countries. And insurance against unemployment has been provided in some of them. The principle upon which these proposals rest is the one already indicated, namely, that society should take care of its workers by protecting them, at the cost of the whole community, against the inevitable vicissitudes of modern economic life. The old individualist policy in industry has expected the worker to protect himself against the results of overwork, underpayment, accident, sickness, and old age. But the worker has failed to do it. He was bound to fail. His failures have had to be made good by somebody—by philanthropic organizations, by charitable individuals, by the public treasury. Those who favor compulsory insurance against sickness, old age, and unemployment argue that it would be cheaper for society to take care of industrial vicissitudes in this way than in the way it is now doing.

6. The  
adminis-  
tration of  
charities  
and correc-  
tions.

Then there is the problem of the poor. Every state has a department under some name assigned to their interests. Commonly it is called the state board of charities. As a rule, the state does not directly undertake the relief of poverty, but intrusts this function to counties, cities, towns, or villages. The duty of the state department of charities is to supervise and in some measure to coördinate the work of those local poor-relief authorities. Likewise this department may have oversight of the institutions maintained for the care or instruction of the insane, the blind, the deaf and dumb, or the handicapped in other ways, or this work may be intrusted to separate authorities. Preferably it is handled separately. The general supervision of state prisons and reformatories is also a function which requires a department of its own; it may be headed by a single prison commissioner or it may be given to a board.

Every state possesses valuable assets in land, roads, and buildings; some of them have also harbors, forests, mines, and fisheries. Various departments are given supervisory functions in relation to these natural resources. Among the several states

there is the greatest variation in the names and the duties of the commissioners or boards which have to do with all such matters. Throughout the greater part of the nineteenth century the natural resources of the country seemed so inexhaustible that they were allowed to be wasted ruthlessly for the profit of individuals but to the ultimate detriment of the whole people. Of late, however, conservation has come to be looked upon as not only desirable but necessary. This policy, as applied to forests, fish, and game, has directed itself to the work not only of protection but of restoration. In the case of harbors, lands, waterways, roads, the problem has been that of improving natural resources and turning them to better account. The encouragement of agriculture in its various branches has also obtained much greater attention from the states as well as from the nation during recent years.

7. The supervision of public property and natural resources.

The department of education is almost everywhere one of the most important among agencies of state administration. It was not always so. In earlier days education was left almost wholly to the cities, towns, and rural areas to be regulated by local school boards according to their own ideas of educational efficiency. Even yet the local school board is in immediate control and in many cases its discretion is still unrestricted; but steadily the state is everywhere taking over a coördinating and supervising jurisdiction. Every state to-day has a department of education or of public instruction under an executive head, commonly called the superintendent of education or instruction. Many of them have state boards of education as well, and some have special authorities for the supervision of the state university or for the other public institutions of higher education. The functions of an education department vary with the degree of centralized control which the state authorities have assumed. In no two states are they alike. In some the department outlines the programme of school studies, chooses the text-books, apportions state funds to local schools, prescribes the qualifications of teachers, appoints school superintendents and settles nearly all the details of educational policy; in others it has much more limited powers; and in others, again, its functions are little more than advisory. On the whole, however, the tide has set towards centralization, towards giving the state departments more power and leaving less discretion to the local school boards.

8. The supervision of public education.

## 9. Assessment and taxation.

The laws relating to the assessment of property for taxation and to the methods of taxing this property have everywhere become so involved and technical that new administrative agencies for interpreting and applying their provisions have had to be created. State boards of assessment or of equalization, state tax commissioners, and various allied authorities now figure upon the list of departments in many of the states. There was a time when virtually complete dependence for public revenue was placed upon property taxes. Such taxes were easy to assess and when imposed could not be evaded. But with the increase of "intangible" property in its varied forms, mortgages, stocks, bonds, franchise-values, and bank deposits, the task of making this form of wealth contribute its just share of the public revenue presented a much more difficult problem. Intangible property, when left to be assessed and taxed by the local authorities, often escapes taxation altogether. Taxes on the profits of corporations, on franchise-values, and on inheritances also present practical difficulties in the way of local assessment. So the states, in many instances, have provided the municipalities with assistance; in others they have taken the levying of some taxes directly into their own hands. State tax commissions or commissioners now exist in most of the states, with constantly increasing powers for the assessment of property for purposes of taxation, both local and state, and for the collection of corporation, business, inheritance and income taxes, and a variety of other revenues.

## 10. Regulation of the professions.

In nearly all the states there are various boards whose business it is to issue certificates for the practice of different professions or trades. There are boards of medical and dental examiners, boards of examiners in pharmacy, and in some states boards for the licensing of stationary engineers, plumbers, chauffeurs, nurses, and so on. In some states the courts are charged with the duty of examining candidates for admission to the practice of law; in others this is handled by a board of bar examiners. The general rules concerning eligibility for license to practice these various professions and trades are made by the legislature; but the boards conduct the examinations and grant the certificates. They have also, in most cases, authority to hear charges made against any licensed practitioner and to suspend or revoke certificates. The expense of maintaining these licensing



boards is usually defrayed by the fees which applicants are required to pay.

All the original state constitutions paid particular attention to the organization and control of the militia. It was taken for granted that the military forces of each state would be largely within its own jurisdiction, even though the federal constitution gave to the national government certain authority in time of peace and complete powers in time of war. The federal laws of the last few years have greatly reduced the freedom which the several states have traditionally possessed with reference to their national guard establishments; nevertheless, all the states continue to maintain departments of military affairs.

In addition to all the foregoing there are various miscellaneous boards which look after the odds and ends of state administration. Each state has its quota of them. Sometimes they deal with relatively unimportant matters and meet only once or twice a year. In addition one finds various *ad hoc* bodies, that is, boards created to exercise functions of a temporary nature such as the building of a state capitol or the consolidation of the state laws or the taking of a census. Such bodies go out of existence when their work is finished. Taking the entire category of officials and boards, whether permanent or temporary, the number is surprisingly large. Each has its own sphere of duty and is independent of the others. There is usually no coördination except such as the governor may be able to apply.

This somewhat detailed enumeration of state departments has been undertaken in order to emphasize two features of state administration: first, the scope and variety of its tasks, and second, the decentralized machinery with which these functions are performed. Far more extensively than the various departments of the national government these numerous boards and officials regulate, supervise, and circumscribe the daily life of the citizen. In New York State there are nearly twenty thousand persons engaged in the work of state administration; in Massachusetts there are more than ten thousand. Taking the entire forty-eight commonwealths there must be at least a quarter of a million persons giving their entire time to the various branches of state administration. There is no uniformity in the way they are appointed, nor are they in all cases responsible to the state's chief executive.

11. Supervision of military affairs.

12. Miscellaneous.

Outstanding features of state administration.

Reaction  
against  
the  
increase  
of state  
boards.

It is well that the top-heaviness, the disintegration, and the clumsiness of state administrative machinery should be impressed upon every student of American government. At the present rate of increase some of the states will soon have more boards than there are members in the legislature. This tangled web of administrative organization, wholly unplanned in development, represents an endeavor to cope with the new and urgent problems which growth in population and in the complexity of urban life have thrown upon the public authorities. But it embodies a method of administration which cannot be expanded indefinitely. The maze of jurisdictions and centres of authority will break down of its own sheer weight. Some of the states have been aroused to an appreciation of this fact and have busied themselves with programs of administrative reform. They have reduced the number of state departments and endeavored to centralize responsibility. But this is another story and should be reserved for a later chapter.<sup>1</sup>

A practical  
difficulty  
in  
the way of  
efficient  
state  
adminis-  
tration.

The shortcomings of state administration, as one may observe them at the present day, are not wholly due to the multiplication of isolated departments or to the lack of coöperation among them. Something is attributable to the difficulty which the departments encounter in obtaining capable helpers. Positions on the payroll of the state are everywhere eagerly sought, to be sure, but this is because the remuneration is better, the discipline less strict, the hours of work fewer per day, and the holidays more frequent than in private employment for service of the same quality. But those who seek the positions, and obtain them, are not for the most part persons who would make a conspicuous success in private vocations. Go into the various offices at the state capitol and note the leisurely way in which most of the work is done. Note also the zest with which the exodus of employees takes place when (or even a few minutes before) the clock strikes five. And why not? The service of the state does not afford real careers for young men and women of ability as it does in other countries.

The  
handicap  
of inferior  
service.

The lack of a comprehensive and genuine merit system, covering not only appointments but promotions, is chiefly to blame for this. We blame the employees of the government for not showing more ambition and alacrity; we make their asserted

<sup>1</sup> *Below*, Chapter xxxvi.

slothfulness the butt of our humor; but they are not to blame. Our system of appointing and promoting them is at fault. The worker in a bank or an insurance office exerts himself because he knows that his advancement depends upon it. But those who work in the office of the tax commissioner or the registry of motor vehicles, or the bureau of factory inspection, or in any other state office are well aware that personal ability and hard work afford no certain guarantee of promotion when the time comes. How often, indeed, does a man who has spent years in a state department, with a record for excellent work, find some politician installed over his head when a vacancy comes! It should not be so.<sup>1</sup>

<sup>1</sup>The most useful volume on the subject covered in this chapter is J. M. Mathews, *Principles of American State Administration* (N. Y., 1917). See also the same author's later volume on *State Government* (N. Y., 1924).

## CHAPTER XXXIII

### STATE FINANCE

In private finance the amount of expenditure is limited by the amount of revenue. In state finance the amount to be expended is first agreed upon, and plans are then made for raising sufficient revenues.—*Walter F. Dodd.*

The scope  
of public  
finance.

Public finance is usually considered under three main heads: revenue, expenditure, and debt. But each of these headings suggests various subdivisions. Under the head of revenue is necessarily included a discussion of the various sources from which a public authority obtains money to carry on its work, whether from taxes on property, incomes, inheritances and franchises, or from fees, fines, rentals and so on. Likewise, there are questions as to the way in which the taxes are levied, the system of assessment, the classification of property for taxation, and the practice of exempting certain forms of property from taxation altogether. Under the general head of expenditure various important questions also arise. How are appropriations voted and under what restrictions? How and by whom is the budget made, if there is a budget? What checks are there upon extravagance or dishonesty in expenditures? Finally, a consideration of state debts brings forward such matters as constitutional limitations upon indebtedness, the methods of borrowing, and the nature of the arrangements made for the payment of public debts as they mature.

Its steady  
enlarge-  
ment.

Originally all this was a relatively simple matter, easy for any layman to understand. The states required very little money, and they got most of it in the same way. Most of them had no indebtedness at all. But these halcyon days have now gone by. The states have been steadily enlarging their activities; they do ten times as much for the citizen as they did a century ago. Doing more, they have had to spend more. Spending more, they have needed more revenue. Needing more revenue they have



had to devise new forms of taxation, some of them exceedingly complicated. Some of them have worked out elaborate systems of budget-making and budgetary control. And many of them have piled up huge burdens of indebtedness. The total expenditures of all the states, for all purposes, now amount to about a billion dollars a year, or about ten dollars per capita. This represents nearly a doubling of the cost during the past ten years. Taking the states as a whole, about one-third of the entire expenditure goes for education and nearly a quarter for welfare institutions of all sorts—hospitals, asylums, prisons, reformatories, poorhouses and so on. More than ten per cent goes for highways, and the rest is distributed among a long list of state functions.

From what sources do the states obtain all this money?

Of the entire revenue obtained by the states at the present time the larger part comes from taxes on real and personal property, usually in the form known as the "general property tax." This is a tax levied at a uniform rate upon the assessed value of real property, which includes lands and buildings, and upon personal property such as merchandise, bonds, stocks, and mortgages. Taxes on property may be levied by the state directly, or they may be imposed by the county, city, or town, and then turned over in part to the state treasury.

Sources of  
state  
revenue.

The  
general  
property  
tax.

Most of the states formerly maintained in their constitutions a provision that all taxes on property should be general or proportional; in other words that all property of whatsoever kind, if taxed at all, should be taxed at a uniform rate. This requirement was part and parcel of a political philosophy which insisted upon the strict equality of all men before the law. That dogma was interpreted so rigidly in the early years of American history that public opinion regarded the taxing of one form of property at a different rate from another as an act of discrimination and injustice. The natural equality of men was extended to their property. In these earlier days, moreover, property consisted for the most part of tangible things: lands, buildings, merchandise, and slaves. What we now call "intangible" property, such as mortgages, bonds, and stocks, did not then form a large factor in the total wealth of the community.

Restric-  
tions  
on the  
classifica-  
tion of  
property  
for tax-  
ation.

But all this has now been changed. The growth of intangible wealth during the past half century has been enormous; to-day

Removal  
of such  
restrictions.

it forms the major portion of our entire national wealth. Its distribution among the people has become so unequal, moreover, that the policy of taxing all kinds of property at a uniform rate no longer serves the ends of social justice. Hence it is commonly believed that a more equitable distribution of public burdens can be made by classifying property into various forms and by levying a different rate upon each. Many of the states now permit this to be done, but the requirement as to uniformity still remains in a few state constitutions.

The tax-  
ing of  
intangible  
property.

Entirely apart from any theory of social justice in taxation there is also the practical consideration that when a state attempts to tax both tangible and intangible property at the same rate, a large portion of the latter escapes taxation altogether and the former is forced to bear a disproportionate share of the burden. Lands and buildings, machinery and merchandise, cattle and grain, are in sight to be levied upon; they cannot easily be hidden when the assessor comes around. But intangible wealth does not parade itself to be taxed. Unless the owner comes forward with a declaration of its value it is difficult to list it for taxation at all. Bonds and stocks are stowed away in safe-deposit boxes. Nobody but the owner knows how much wealth is kept there under lock and key. Even penal laws have not availed to make him disclose their true value. This explains why the practice of grouping property into different classes and taxing each class at a different rate is growing in popularity. In time it is likely to become universal.

It is mainly for this reason that one state after another has adopted, in recent years, the practice of separating tangible from intangible property and levying a much lower rate upon the latter. This lower rate is either placed directly upon the value of intangible property or it is levied upon the income derived therefrom. In either case there is usually a legal requirement that every owner, trustee, or recipient of income (with certain exceptions) must file a sworn declaration as a basis for a true assignment. Only in some such way has it been practicable to make wealth in the form of securities pay its due contribution to the public income. The general property tax, under the economic conditions of to-day, is unsound in theory and unjust in its operation. It treats all forms of property alike when there are vast differences in the various forms of modern property.

It leads to tax-dodging on a large scale and tempts even honest men to evasion—for if they paid the general property tax on their stocks and bonds they would often be giving up more than half the income from it.<sup>1</sup>

Real estate and tangible personal property are taxable wherever situated, no matter to whom they belong.<sup>2</sup> On the other hand a state cannot tax tangible property outside its own limits, even though the owner resides within. Intangibles may be taxed either where the owner resides or where the securities are kept. The usual plan, in accordance with the principle *mobilia sequuntur personam*, is to tax intangibles in the state where the owner has his domicile or legal residence. To put the matter concretely: lands, buildings, machinery, merchandise, and money (whether in the bank or on hand) are taxed wherever they are; mortgages, trust deeds, bonds, stocks, notes and so forth are usually taxed at the owner's *legal* residence, which is not always the place where he actually lives.

What the  
states  
may tax.

The levying of taxes is always preceded by a formal step known as the assessment. In nearly all the states this assessment or recording of property valuation is made by municipal or county assessors. The same lists are then used as the basis of state and county and municipal taxes. All property is supposed to be assessed at its fair market value or at some specified percentage of this value. In any event the assessments are revised from time to time, sometimes every year, but for purposes of state and county taxation not usually more often than once in every three or five years. Throughout the country the work of assessing is rather poorly performed because the assessors are usually elective officials with no special training for the function of estimating property values correctly. Much of what they do is mere guesswork.

The  
process of  
assess-  
ment.

When the assessors have finished their task each property-owner is notified of his assessment. An opportunity is given him to appeal if he thinks the assessment too high. Such appeals are frequent, and in the first instance they are heard by a local board of revision. This board may reduce the assessment or let

<sup>1</sup> A tax rate of twenty-five dollars per thousand on the value of real estate is not excessive; but a tax of twenty-five dollars on a thousand-dollar-bond bearing five per cent interest, takes half the owner's income from the bond.

<sup>2</sup> Property owned by the United States, of course, is not taxable in any of the states.

it stand. The state uses these municipal or county assessments as a basis for levying state taxes, but only after provision has been made for securing uniformity. There being different assessors for each city or county the assessments often show great inequalities, hence a state board of equalization (or state tax commission) goes over the lists and does what it can to equalize them.

Other  
state  
taxes :  
The in-  
heritance  
tax.

While many states place their chief reliance upon the taxation of property, either at uniform or classified rates, all of them have other forms of taxes and some derive a large part of their entire income from these other sources. The inheritance tax is one of them. As the name implies, it is a tax upon inherited property, and the rate usually varies according to the value of the estate. Small inheritances are exempt.

Taxes on  
incomes.

Corpora-  
tion taxes.

Taxes on the income of individuals and on the income of corporations are also levied in several states. Corporations, especially railroads, street railways, lighting, telegraph, and telephone companies, banks, and insurance organizations are being more and more placed in special categories and taxed accordingly. In some states they contribute large amounts each year to the public income. All these special taxes are assessed by the state through its own officials, not by local assessors. The methods of assessment are sometimes very intricate and none but the tax experts understand them.

Revenues  
from  
other  
sources.

Almost every year sees the invention of some new form of tax. The gasoline tax, for example, has come into vogue recently and is being widely adopted. All gasoline for use in motor cars is taxed one or two cents per gallon, the proceeds being usually devoted to the building and maintenance of roads. Pennsylvania lays a tonnage tax on anthracite coal. Connecticut levies a tax on all sales of merchandise. Some southern states have taxes on various forms of business. A few states have poll taxes. And in all the states there are revenues from fees, licenses, fines, forfeits, the earnings of public enterprises, and from interest on state funds deposited in banks.

State ex-  
penditures.

When money comes into the state treasury it can be paid out again in only one way, that is, under authority of an appropriation duly made by the legislature. The appropriation may be specific, designating a certain sum for a certain purpose, or it may be general and continuing, as for example when it author-



izes a state department to expend such amounts as it may receive in fees. Most of a state's income is appropriated annually or biennially upon estimates of necessary or desirable expenditure submitted to the legislature by the governor or the heads of departments, but appropriations are also made on the initiative of the legislature itself.

It is a general rule of state government that measures which involve the expenditure of money shall originate in the lower chamber of the legislature. The state Senate may, however, amend or reject such measures. But in none of the states, with one exception, is there anything approaching the English practice which gives the executive branch of the government the sole power to initiate appropriations.<sup>1</sup> Any citizen may father a proposal to spend the state's money, and he usually finds no difficulty in getting some member of the legislature to introduce it for him. Hence proposals for expenditure come from all quarters, each with more or less political pressure behind it.

Appropriation bills originate in the lower chamber.

Until about a dozen years ago this haphazard system of originating and voting appropriations was in vogue everywhere. When the legislature assembled it was deluged with estimates from the various departments, bureaus, boards and commissions. Each asked for more money than it had spent in the previous year, and usually for more than it expected to get. All these estimates went to a committee of the legislature or were divided among several committees, whereupon a general scramble among the seekers for increased appropriations usually followed. Each department and board lobbied and pulled wires to get what it wanted—and the strongest always got the most. At any rate the estimates, after being reviewed and revised by the committees, were lumped into appropriation bills (often a dozen of them) and duly passed by the legislature.

The old method of considering them.

But this was not all. Numerous bills providing for special expenditures were also introduced by individual legislators. These also were referred to committees and many of them ultimately passed both houses. Day by day these appropriation measures kept sliding through, with nobody keeping track of them and with nobody doing much to prevent their passage. No one could tell, until the end of the session, how much the total expenditure was going to be. Even then no one could be cer-

<sup>1</sup> See *above*, p. 286.

tain, for scores of bills were rushed through in the last few hours. The consequence of all this was that the appropriations often exceeded the state's revenue by a considerable margin and the next legislature had to make good the deficit by raising the tax rate.

The newer  
budget  
systems :

Beginning in 1911, however, some of the states undertook to reform this procedure by the establishment of a regular budget system. Wisconsin was the first to act, but others quickly followed and today virtually all the states have budgets of some sort. Hardly any two of them follow exactly the same plan but as regards the general procedure all of them may be divided into three groups.

1. The  
legislative  
budget.

A few states have adopted what may be called the "legislative" budget system. Under this plan the estimates of revenue and expenditure for the fiscal year are transmitted by the various executive departments to some committee of the legislature, usually the committee on ways and means. There the various items are reviewed and altered as may be deemed advisable; then they are embodied in a single appropriation bill and laid before the legislature where the measure goes through the regular three readings. Under this plan the framing of the budget is entirely in the legislature's hands. Executive officials have no part in it.

2. The  
commission  
budget.

In a much larger number of states, about twenty of them, there is what may be called the "commission" budget system. The estimates are first submitted to a board or commission established for this purpose. In some states the commission is made up of executive officers and members of the legislature; in other states it is composed of executive officers only. At any rate this board assumes the function of revising the estimates and presenting them to the legislature in the form of a budget or comprehensive appropriation bill.

3. The  
executive  
budget.

Finally, about half the states have adopted the "executive" budget plan. Under this plan the governor is made directly responsible for receiving the estimates, revising them, putting them in the form of a budget, and submitting this budget to the legislature with his recommendations. At the same time he submits an estimate of what the state's revenue for the ensuing year is likely to be. In Maryland, where the system was established by a constitutional amendment in 1916, the legislature is

The  
Maryland  
plan.

forbidden to increase certain classes of items in the budget but it may reduce or strike them out. In the other states having the executive budget system the legislature is free to amend as it pleases—subject to the governor's veto. When we say that the governor prepares the budget this does not mean, of course, that he does the routine work. He appoints experts to do it for him. He takes the responsibility. He is the planner of state finances for the year. If the legislature insists on spending more than the governor recommends, the people then know whom to blame.

There has been much discussion as to which of these budget-making plans is productive of the best results. Is the work of budget-making primarily a legislative or an executive function? In England, where the fruits of long experience are available, the entire initiative in all financial matters rests with the executive, the ministry. Hence England is said to have an executive budget system. But the English ministry, although constituting the executive, is also a great standing committee of parliament, all its members having seats in parliament. For its continued existence the ministry is dependent upon the will of the House of Commons. It is therefore equally correct to say that England has a legislative budget system, since parliament, through a ministry made up of its own members, controls the entire budget-making power from start to finish. In the United States, owing to the separation of executive from legislative power, there is no way in which the function of budget-making can be given entirely to one branch of the government without excluding the other. Hence it must be given either to the legislature alone, or to the governor alone, or to some board which is assumed to represent both the legislative and the executive branches of the government. Both the first method and the last have some serious defects, so there is a growing disposition to place the responsibility upon the governor alone. This is not because of any political theory but solely for the reason that control by one man seems likely to prove the most effective method of keeping expenditures within bounds.

The governor represents the state as a whole, and the general direction of financial policy may on that account be appropriately committed to him. But this policy, if consistently followed, will eventually upset the balance of power in state gov-

Relative merits of different budget plans.

The executive type of budget is proving the most popular.



ernment. It will make the governor supreme. Analogous action in city government has raised the mayor to a dominating position and has reduced the city council to virtual impotence. It is altogether probable, judging from municipal experience, that a budget system like that of Maryland, if generally adopted by the states, will make the governor as dominant at the capitol as mayors have become at the city halls of the larger municipalities. And the more so if all governors are given a power which some of them now possess, namely, the power to veto individual items in appropriation bills.

The aim  
is alike  
in all  
these  
types.

No matter what the type of budget, the object aimed at is always the same. A budget system endeavors to compel the careful planning of the year's financial operations and thus to prevent deficits. It aims to create a definite responsibility for over-expenditure and waste. All of the three budget systems above mentioned have these ends in view. The "executive" budget plan is generally deemed to be the best because it concentrates the responsibility in one man (the governor) rather than in several men (a legislative committee or a joint commission). Everybody now agrees that the introduction of a budget system has been perhaps the most marked improvement that we have made in state administration since the turn of the twentieth century. The wonder is that our state governments were so long in coming to it.

Essentials  
of a good  
state  
budget  
system.

A sound budget system, of whatever type, ought to have four essentials: First, all estimates of revenue and expenditure should be prepared and placed in the hands of the budget-makers at least two months before the legislature meets. Second, there should be, during these two months, a thorough scrutiny and review of every item by experienced investigators who give all their time to the work. It is absurd to think that a job of this magnitude can be properly performed in a week or two by a committee of legislators, or by some members of an unpaid board, or by a couple of clerks in the governor's office. Third, the appropriations should be incorporated, so far as possible, in a single bill and the consideration of this bill ought to be the first care of the legislature during its session. It should have priority over all else and should be disposed of at an early date. And, fourth, the rules of the legislature should provide that no appropriation be voted after the passage of the budget bill except on



recommendation of the governor or by a two-thirds vote in both houses.

Yet no one but a tyro in practical politics would imagine, even for a single moment, that all extravagance and wastage of public money can be stopped by merely establishing a "system" of some sort. A budget system is a help, but it goes only part of the way. It gives the legislature a chance to be economical; but it does not compel economy. There is only one way of compelling legislators to practice economy, to wit, by bringing upon them a relentless pressure of public opinion in favor of it. If the voters as a whole are in an extravagant mood, or are indifferent to extravagance, no budget system of any type will avail to protect the taxpayer.

A budget system is no panacea.

Not all the wastefulness comes in *making* the appropriations. Much of it comes in *spending* them. Even small appropriations can be wastefully spent. Hence it ought to be provided that the governor shall have power to supervise the spending of money in all departments and he should be provided with experts of his own choosing to assist him in this. It is desirable, also, that every state shall have a system of accounting which will show just where every dollar has gone. And before the legislature votes the next appropriations it should be given an itemized statement showing the exact expenditures for every purpose. Its committees can then call officials on the carpet to explain and justify. There should be ever before the eyes of the spending-officials a possibility that they may have to give a detailed account of their stewardship.

Where much of the waste arises.

The states, like the nation, have power to borrow money and are unrestricted in the exercise of this power by any provision of the national constitution except that they may not "emit bills of credit," that is to say, they may not issue paper money. But nearly all the state constitutions set forth limitations upon the borrowing power. These constitutional "debt limits" are of several sorts. In some states a definite sum is fixed, above which indebtedness must not be incurred except for special purposes, or, in some instances, except with the express assent of the people obtained at a referendum. In other states no definite sum is fixed in the constitution, but the purposes for which debts may be incurred are carefully specified, and borrowing for other purposes is not permitted except when certain onerous formalities

State debts, and debt limits.

have been complied with. A few states fix the limit of indebtedness at a certain percentage of the total assessed value of taxable property. Only three of the forty-eight states have no constitutional debt limits at all. In the remaining forty-five the limitations are of the widest variety in character, scope, and stringency. At the one extreme is Louisiana, which permits no borrowing at all except for the purpose of repelling invasion or suppressing insurrection; at the other is Vermont which allows its legislature to borrow as much as it pleases.

Is the  
present  
debt  
burden  
excessive?

Naturally there is a great variation in the amounts of indebtedness which the several states are carrying. This is not due to the presence or absence of constitutional checks upon the borrowing power, but is mainly accounted for by the wide difference in what the several states undertake to do for their citizens. The net debt of New York state is about one hundred and eighty millions. Massachusetts and California come next, then Virginia and Maryland. In estimating the burden which a debt imposes upon any state it is usual to express it in terms of so much per head of population. On that basis the burden is nowhere excessive. The net debt of New York is only about fifteen dollars per capita. The national debt of the United States, expressed in per capita terms, is larger.

Methods of  
borrowing,  
and of  
providing  
for repay-  
ment.

The states borrow money, when they have occasion to do so, by the issue of bonds. These bonds run from ten to fifty years or even longer in some cases. A generation or two ago it was the almost invariable custom to issue bonds with no special provision for having funds in hand to pay them at maturity. Consequently, when the bonds fell due in twenty or fifty years thereafter, there was no easy way of making payment except by re-borrowing. Sometimes this could be effected at some saving by the issue of new bonds bearing a lower rate of interest than the old. Paying off old bonds by issuing new ones at a lower rate of interest, as has been mentioned, is commonly known as re-funding. But in recent years it has become the practice, although there are still many departures from it, to provide a sinking-fund whenever an issue of bonds is made. This is a fund into which is paid every year out of current income a sum sufficient to enable the bonds to be redeemed when they mature.

1. The  
sinking-  
fund  
system.

Defects  
of this  
plan.

The sinking-fund method of providing for the ultimate liquidation of state debts is of course far better than no pro-

vision at all, yet in actual practice it has shown serious defects. The necessary annual contributions to the fund are sometimes omitted for one reason or another, usually because of urgent demands from other quarters. Money is sometimes taken from the fund to meet a temporary emergency and then is not replaced. The sinking-funds are occasionally invested without due care and lost. When a state invests its sinking-funds, it takes the same risk as a private individual. Because of losses in the past the laws now restrict the investment of sinking-funds in such way as to reduce the element of risk to a minimum. But in any case the sinking-fund places a large amount of money and securities in the custody of a few officials who are usually chosen by popular vote, the state treasurer or a board of sinking-fund commissioners. The temptation to deposit the funds in favored banks or in other ways to use them for political or personal ends is sometimes too strong to be resisted. Hence it often happens, for one reason or another, that sinking-funds do not contain enough money when the time comes to use them in extinguishing the state's obligations.

A better plan of borrowing is to serialize the dates of maturity in such way that one or more bonds will come due for payment each year. This serial bond plan obviates entirely the need of creating sinking-funds. A definite proportion of the debt is regularly extinguished each year by applying from current revenue what would go into the sinking-fund, more or less. Many cities now use the serial plan, and some of the states have adopted it with highly satisfactory results. Between the ultimate cost of the two plans there is no great difference, provided each is carried out exactly as planned. But in actual practice the serial plan almost invariably works out to be the cheaper method of borrowing, for it entails no long holding-over and investing of money with the attendant dangers of loss.

It has been the custom in some states to look upon all public debts as evils to be scrupulously avoided. In others the idea seems to be that nothing should be paid for out of current income if by any way it can be provided for by loan, and thus passed on to a future generation. Neither policy is sound. When money is needed for public works of enduring character, such as a state capitol or a system of canals or of state highways, borrowing is a legitimate and even an equitable way of

2. The serial bond system.

Some general considerations

obtaining it. It is neither just nor expedient that the taxpayers of to-day should be forced either to bear the whole burden or go without. The cost of capital improvements may fairly be pro-rated over the years in which they are destined to render service to the public. On the other hand, future generations will have their own sufficient burdens and ought not to be unduly hampered by legacies of debt from the past.<sup>1</sup>

<sup>1</sup> Some useful books in this field are H. L. Lutz's *Public Finance* (New York, 1924); Mabel Newcomer's *Separation of State and Local Revenues* (New York, 1917); T. S. Adams, *Needed Tax Reforms in the United States* (New York, 1920); F. A. Cleveland and A. E. Buck, *The Budget and Responsible Government* (New York, 1920); and A. E. Buck, *Budget Making* (New York, 1921). Attention should also be called to the *Model System of State and Local Taxation*, prepared by the National Tax Association (printed in its *Proceedings* for 1919, pp. 426-470), and to the volume of *Financial Statistics of States* issued annually by the United States Bureau of the Census.



## CHAPTER XXXIV

### THE STATE COURTS

Government is a device for applying the power of all to secure the rights of each. Any government is good in which they are thus effectually secured. That government is best in which they are so secured with the least show of force.—*Simeon E. Baldwin.*

In addition to the federal courts already described, every state of the Union has a system of state courts established under the provisions of its own constitution and laws. Between these state courts and the federal courts there are many marked similarities of organization and procedure, but two essential differences are to be noted. One is that in most of the states the judges are elected by the people, whereas there are no elective judges in any federal courts. The other difference has to do with the range of jurisdiction possessed by the two sets of tribunals. The matters with which the federal courts may deal are explicitly defined in the constitution of the United States. The federal courts possess such branches of jurisdiction as are there enumerated, and no more. They administer the law of the United States. The state courts, on the other hand, are vested with all remaining judicial authority. They administer the law of the state. And since this law deals with a greater variety of matters the state courts exercise authority over a far wider range, and handle a far larger proportion of the total litigation of the country, than do the federal courts.

Relation  
of the  
state to  
the federal  
courts.

In all the colonies the judges were appointed by the governor or the colonial legislature; in none of the colonies were there any elective judges. And after the winning of independence the plan of appointing judges was continued in all but one of the thirteen states.<sup>1</sup> The framers of the national constitution accepted this method as a matter of course and empowered the President to appoint all federal judges. As time went on, how-

Differences  
among  
the state  
courts:

<sup>1</sup> Georgia was the one exception.

1. In  
methods of  
choosing  
judges,

ever, the practice of electing judges came into vogue in some of the new frontier states of the West. Pioneer communities usually insist that justice shall be speedy, inexpensive and devoid of technicalities. They want justice administered on a "democratic" basis. It was so during the development of the great western areas in America. Most of the new states in this region organized their courts on an elective basis and the influence of their example extended to some of the older states as well. To-day there are only ten states (all of them from among the original thirteen) in which the judges are not directly elected by the people.

2. In  
procedure.

No two states have exactly the same system of court organization or of judicial procedure. Yet the differences in procedure are not of fundamental importance save in one case, Louisiana, where the civil procedure has been greatly influenced by the Code Napoléon of France. In the other forty-seven states the example of the federal courts has been very influential and has tended to promote uniformity. Hence it is that when a man studies law and is admitted to practice in one state he finds himself at no great disadvantage if he moves to another state. The fundamentals are the same. It does not take him long to familiarize himself with the differences in details of procedure and method.

Present  
organiza-  
tion  
of state  
courts:

1. The  
lowest  
courts.

In every state there are three grades of courts, and sometimes more. First there are the lowest courts, local courts presided over by justices of the peace, municipal justices, or similar officers who are chosen by popular election in all but a very few states. Everywhere the jurisdiction of these local courts is limited to civil and criminal cases of relatively minor importance. Frequently, however, the local justice conducts the preliminary hearings where serious criminal charges have been made and determines whether or not the accused shall be held for trial by a higher court. These local courts are not provided with juries; their procedure is of a summary character. As a rule the justices of the peace in rural districts have had no training in the law but in towns and cities it is customary to choose men who are better equipped. In many of them the unpaid justices of the peace have been replaced by paid magistrates or police justices who hold court every day. The work of these local courts is of much greater importance than most students of gov-

ernment realize. They deal with an enormous number of cases and it is from them that the average man obtains his conception of American justice. When these courts are arbitrary or inefficient, or corrupt they throw suspicion on the whole judiciary, no matter how competent, fair and honest the higher courts may be. The local courts are the lowest in jurisdiction but by no means are they the lowest in importance.

Next come a higher range of courts, known by various names. Most commonly they are called county courts, but sometimes district courts, and occasionally they are known as superior courts, circuit courts, or courts of common pleas. Whatever they may be called, they are intermediate courts which hear appeals from the decisions of the local justices and also have original jurisdiction over a considerable range of cases, both civil and criminal. Everywhere they are presided over by regular judges. They are courts of record, so-called, because each is provided with a clerk. These intermediate courts are the ones to which the grand jury makes its report and presents its indictments. They also impanel a trial jury when necessary and in most cases the verdict of this jury is final as regards all questions of fact. But on points of law there is usually a right of appeal from these intermediate tribunals to the supreme court of the state.<sup>1</sup>

2. The intermediate courts.

This supreme court of the state usually consists of from five to nine judges who sit together and render their decisions by a majority vote.<sup>2</sup> Sometimes they sit individually, but only to deal with routine matters such as the hearing of motions or the issue of temporary writs. These judges, or justices, are elected in most of the states, but appointed in some of them. The terms vary all the way from two to twenty-one years,—in three states the term of office is for life or good behavior.

3. The supreme court of the state.

The supreme court devotes itself almost entirely to the hearing of appeals on points of law. Only in exceptional cases does it have original jurisdiction. Not having to do with questions of

Its function.

<sup>1</sup> In some states the county court is given various functions which are not of a judicial character, but largely administrative—such as the building of roads and the supervision of poor relief. This is a legacy from England where the county courts, in the old days, performed many administrative duties.

<sup>2</sup> In New York State there is a Supreme Court which is not in reality supreme but is subordinate to the Court of Appeals which is the state court of last resort.

fact it does not sit with a jury. Its decisions are final in the great majority of cases. They are final whenever the issue relates solely to rights claimed under the constitution and laws of the state, with no federal question involved. And this is true of nine-tenths of the litigation in the state courts. If, however, the controversy involves some substantial right claimed under the federal constitution or the national laws an appeal may usually be taken by a writ of error to the Supreme Court of the United States.

The  
supremacy  
of the  
state  
courts in  
their own  
sphere.

This point will bear emphasis, for there is a widespread popular impression that all state courts are subordinate to all federal courts, that the lowest court in the federal system is superior to the highest court in the state. That impression is wholly erroneous. The federal and state courts do not form a hierarchy, one above the other, but run parallel. The resemblance is not to a ladder but a gangway. Each set of courts is independent, each has its own field of jurisdiction and within that field cannot be interfered with by the other. When you want to start a suit at law or equity your lawyer will advise you whether it should be begun in a state court or in a federal court. His advice, if he is a good lawyer, will depend on the nature of the suit and the residence of the suitors. If the issue concerns matters or persons within state jurisdiction, the state courts handle it; if it concerns matters or persons within federal authority, it goes before the federal courts. In some cases there may be an option. But if a suit is entered in one court, and it subsequently appears that it should have been entered in another, it can be removed thereto. The vast majority of law suits originate in the state courts, are decided there, and go no farther. When the supreme court of a state has rendered its decision there is only one way of taking an appeal, that is by writ of error to the Supreme Court of the United States. But no writ of error is ever issued "unless it appears affirmatively that not only was a federal question presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."<sup>1</sup> In the vast majority of instances this condition cannot be met and there is consequently no appeal.

<sup>1</sup> *De Saussure v. Gaillard*, 127 U. S. 216.



The Supreme Court of the United States has not been free-handed in its interference with the decisions of the highest state tribunals. It has repeatedly declared that in controversies affecting the interpretation of a state law the decision of the highest court in that state is ordinarily to be regarded as final and will not be set aside. It goes on the principle that those who engage in a controversy before the state courts must ordinarily accept whatever interpretation of the state laws these tribunals give. But if it be contended that the state law in question is repugnant to the Constitution of the United States this raises a larger question, and the Supreme Court of the United States has the last word on such matters.

Relative  
infringe-  
quency  
of federal  
inter-  
ference  
with  
state  
decisions.

When you hear that a state law has been declared "unconstitutional" this may mean either of two things: first, that the supreme court of the state has declared it to be in conflict with the state constitution or, second, that the Supreme Court of the United States has declared it to be in conflict with the national constitution. It may, indeed, be in conflict with both, but as a rule it is the state constitution that forms the barrier. Let this point sink into the reader's mind, for nine laymen out of ten think only of the national constitution when they hear that some state law has been shattered by a head-on collision.

How  
state laws  
may be  
declared  
unconsti-  
tutional.

In addition to its regular tribunals every state has certain courts of a special character. Among these are probate or surrogate courts for the settlement of questions relating to wills and inheritances, although in some states there are no special courts for these matters, the work being done by the regular county courts. In a few states there are land courts which have to do with the investigation and registration of land titles. In addition there are sometimes special divorce courts, courts of domestic relations, small claims courts, juvenile courts and so on. The whole tendency is towards specialization in the organization and work of the state courts.

Special  
state  
courts.

In general it is the duty of all the state courts, regular and special, to decide cases which actually come before them and not to venture opinions on any other matters. Courts do not pass upon hypothetical cases; they have enough to do in dealing with controversies which actually arise. But in some states there are important exceptions to this rule, and these exceptions should be noted. The constitutions of eight states provide that the

Advisory  
judicial  
opinions.

governor or the legislature may call upon the justices of the highest state court for an "advisory judicial opinion" on the interpretation or constitutionality of an existing law, or a proposed law. But such opinions, as has been pointed out, are not final or conclusive. Yet they are of the greatest value to legislatures especially, and on numerous occasions have forestalled the enactment of laws, which, had they been enacted, would inevitably have been declared invalid.

Declara-  
tory  
judgments.

There is another exception to the rule that court decisions are restricted to actual suits, namely, their right to render "declaratory judgments." This is a long-established practice in the countries of Continental Europe, but relatively new in America. Within recent years several American states (including California, New York and Wisconsin) have authorized their courts to issue, on matters of existing law, declarations which have the force of judgments although no lawsuit is actually before them. The idea is to enable the courts to make clear what the rights and obligations of the citizen are before the litigation arises, not after it.

Some  
current  
problems  
connected  
with state  
courts :

1. The  
election  
of judges.

Several important questions come up in every discussion of the state courts and their work. The first relates to the method of choosing judges. This is an old question; lawyers and statesmen have been wrangling about it for just about a hundred years. Choosing judges by popular vote is a strictly American contribution to the science of government and one which no other country has copied. Yet the elective judiciary has acquired so extensive a vogue in the United States that there are now no appointive judges in the regular courts of any state west of the Alleghanies. The reasons for this extension of the elective principle are partly historical and partly the outcome of practical considerations. During the period when the frontier spirit dominated a large part of the United States there developed the idea that true democracy involved direct popular control over the law-enforcing as well as over the lawmaking branch of the government. This idea was plausible and found wide acceptance. Quite as important was the practical consideration that legislatures and governors, in these earlier days, often appointed too many judges of a pettifogging temperament who did not dispense justice quickly and informally as seemed to befit a democratic community.

So the principle of having judges elected by the people spread through three-fourths of the states. But in actual practice the people do not really choose the judges. How, indeed, could a body of a hundred thousand voters obtain the knowledge necessary to insure the placing of legal knowledge, sound judgment, and integrity on the state bench? The answer is, that the people do not have such knowledge and do not presume to have it. In many states there is a tradition that a judge, when once elected, shall be retained in office so long as his conduct is at all satisfactory. This means, then, that vacancies on the bench occur, for the most part, only when a judge dies or resigns. When vacancies come in this way, the governor is usually given the right to make an appointment until the next election, and this appointee is likely at that time to be a candidate with the chances much in his favor. Many elective judges, therefore, really owe their election to a governor's temporary appointment.

How the system of elective judges has worked out.

The influence of interim appointments.

If it happens, on the other hand, that a judge retires upon the expiry of his elective term, the choice among aspirants for his place is almost invariably made, in the first instance, by the leaders of the political organizations. They regard judgeships as a form of high-class political patronage. All that the voters can do, as a rule, is to make their final choice from among the candidates thus presented to them by political leaders who are not primarily interested in the impartial administration of justice but desire to bring the judiciary into the orbit of partisan politics. Occasionally, to make the assurance doubly sure, the leaders of the opposing political parties go into conference, and agree upon a bi-partisan slate of candidates, each organization getting its share. All intelligent Americans are agreed upon the general principle that the courts ought to be "kept out of politics," but it is hard to see how this end can ever be attained so long as the political leaders play a large part in making the nominations.

Influence of bar associations and of political leaders.

So most elective judgeships are in reality appointive. The de facto appointing power always resides somewhere—with the political leaders, or the state bar association, or the governor through the filling of vacancies. Whether the plan of election works well or badly depends, very largely, upon the way in which this de facto appointing power is exercised. Where good candidates are nominated, good judges are usually chosen.

Popular election of judges almost always means de facto appointment.



Is the  
appointive  
system  
better?

Now all this does not mean that the judiciary would be notably improved if we were to abandon the practice of electing judges and provide for their appointment by the governor in all the states. Governors are themselves, in most cases, politicians of high degree. They work hand in hand with the organization, and their appointing power is generally influenced by a desire to help the party. There are all sorts of governors—good, bad, and indifferent. Figs do grow on thistles. There is no good reason why the wrong sort of governor should appoint the right sort of judge. The Massachusetts plan of having the governor appoint judges for life has functioned admirably; it has put the Massachusetts courts on a high plane of competence and non-partisanship. Outsiders point to it as an example of what other states might secure by adopting the same plan of selection. But it does not at all follow. Massachusetts has secured good judges by electing good governors. If the office of governor deteriorates, the judiciary will descend with it. In each state the people get the sort of judiciary they insist upon having; whether they use the method of election or appointment does not make a world of difference.

2. The removal of judges:

(a) by impeachment.

Closely connected with the question of appointing judges is the method of removing them from the bench. Judges of the federal courts may be removed in one way only, that is, by impeachment. Judges of state courts may be removed by impeachment also, but the process of impeachment is not the same in all the states. As a rule, however, the charges are framed by the lower chamber of the state legislature and the impeachment is heard by the state senate. Aside from impeachment there are two other ways of removing a judge before the expiry of his term. In twelve states a judge may be removed by a resolution of the legislature and in nine others by the governor on an "address" of the legislature. In seven states a judge may be "recalled" from office by popular vote.

(b) by address.

Removal "by address" is a method borrowed from England where it was long ago devised as a means of protecting the judges against arbitrary removal by the crown. As established in various American states it is not ordinarily required that specific charges be filed or that anything like a trial, as in an impeachment, shall be conducted; but it is customary to reduce the complaints against a judge to written form and to give him some



sort of hearing thereon, either before a committee of the legislature or before the governor. There is a marked difference, accordingly, between removal by impeachment, removal by a joint resolution of the legislature, and removal by address. The first is a judicial proceeding, carried out with due regard to the forms of law and the rights of the accused. The second is an ex parte legislative process, and in the third the final decision rests in the governor's hands. The removal of a judge by means of the "recall" is a modern arrangement and originated in the United States. This device is elsewhere explained with respect to the executive and legislative branches of state government; its machinery and workings are much the same when applied to the judiciary.<sup>1</sup> A petition signed by a designated number of voters is presented asking for the recall of a judge from office. The question is put upon the ballot, and if the popular verdict is adverse, the judge steps down.

(c) by  
recall.

The reputed merit of the plan is that it serves to keep the interpretation and enforcement of the laws in harmony with public sentiment. The judge sits with the sword of Damocles over his head, being thus reminded that he is the servant and not the master of the people. On the other hand the objections commonly urged against the recall of administrative officials apply with even greater force in the case of judges. The courts should be free from the momentary onsets of prejudice or passion. Courage and independence, freedom from the taint of political partiality, are essentials of a good judiciary. It is argued that the recall will place a premium on pusillanimity, making the bench no longer a rock of defence against the abuse of political power. Much will depend, of course, upon the tradition which the recall develops. If wisely and conservatively used, the recall offers no greater menace to the independence of the judges than does the plan of removal by resolution or by address. The latter might easily become a weapon of shameless intimidation, but has nowhere done so. Potential dangers, it ought to be remembered, are often not realized in the actual practice of free government.

Reputed  
merits and  
defects  
of the  
recall as  
applied  
to the  
judiciary.

Some years ago Colorado adopted a constitutional amendment by virtue of which the recall procedure might be applied not merely to the judges but to their decisions. The arrange-

The  
recall of  
judicial  
decisions.

<sup>1</sup> Below, pp. 556-557.

ment, briefly stated, was this: Whenever the supreme court of Colorado declared a law unconstitutional, a stated number of the voters might petition for a popular referendum on the question of enforcing the law in spite of the court's ruling. And if the people voted affirmatively the law would be enforced. But the supreme court of Colorado declared the constitutional amendment providing for the recall of judicial decisions to be itself unconstitutional, that is, in conflict with the provisions of the federal constitution.

3. The  
reform of  
court or-  
ganization.

Many other problems are connected with the organization and work of the state courts at the present day. The judicial system, in most of the states, is largely a heritage from the past. Starting with a simple organization, well adapted to the needs of a century ago, the older states have steadily added more judicial machinery bit by bit until there is no longer any unity or coherence to the whole. The jurisdictions of the various courts, regular and special, are so badly articulated that even the judges are themselves very often in doubt. What many of the states ought to do is to reorganize and simplify their entire hierarchy of courts from top to bottom. But the lawyers, as a class, desire nothing of the sort and their influence in legislatures is powerful. It is believed to be to the advantage of the legal profession that the courts and the law should remain befogged beyond the layman's comprehension.

4. The  
reform of  
court  
procedure.

The procedure of the state courts has also come in for much criticism. Litigation is slow and expensive. The jury system, especially in civil cases, has been so strenuously overworked that it is breaking down. The lower courts are doing so much unsatisfactory work that the higher tribunals are deluged with appeals; their calendars have become so badly congested that if an appeal is entered today it may be a year or even two years before the case can be heard. The delays, the expense, the technicalities, and the pettifogging—all of them work injustice. They play into the hands of the shyster and his clients. The student of civics who told his teacher that "a courthouse is a place where justice is dispensed with" was not so far wide of the mark as those who laughed at him may have supposed. Certain it is that our state courts give the crook a better run for his money (when he has the money) than he would obtain before the tribunals of any other country. It is not that the judges

abet this situation, or are in any considerable measure responsible for it. Their hands are tied. They are compelled to follow a procedure which is laid down for them. This procedure has been framed by lawyers, in the interest of lawyers—not by judges in the interest of justice. For lawyers usually dominate the constitutional conventions and the state legislatures. There is urgent need for a thorough-going reform and simplification of judicial procedure in almost all the states.

Finally, there is the ever-recurring question whether the courts of the state should retain their power to declare state laws unconstitutional. This power they are now exercising freely and in the face of much criticism from various elements among the people. Not infrequently the supreme court of a state invalidates a law by a divided vote of its own justices, the court standing five to four or four to three. The reasons given for their action, in many instances, are so legalistic and technical that even very intelligent laymen (and sometimes many lawyers as well) cannot fathom them. A state law is unconstitutional, for example, if it deprives a citizen of his property without "due process of law," for such a clause (or its equivalent) appears in practically all the state constitutions as well as in the fourteenth amendment to the Constitution of the United States. But what is due process of law? There is not a jurist in the land who is able to give a precise definition of that term. Due process is what the court says it is. It is one thing today and may be another thing next autumn. Somebody once remarked that "giving a man due process is merely giving him a square deal"—and that definition is as good as any other because it is fully as indefinite. What constitutes a square deal varies with a judge's point of view. Hence it is that the "due process" clause gives the courts a wide latitude in testing the constitutionality of laws not by some hard and fast rule but by the yardstick of their own opinions. And since judges are of diverse opinions and temperament in the different states, there are no two states in which due process of law means exactly the same thing. Hence a zoning ordinance may be held to deprive a man of his property without due process in one state, while the same ordinance, word for word, may be held to afford due process in another. The layman does not discern much common sense in this; he regards it as an absurdity—which it is.

5. Taking away some powers from the supreme courts of the states.

A possible  
remedy.

But the state constitutions, not the state courts, are to blame for it. Constitutions ought not to contain clauses which nobody can define. It is the business of constitution-makers to employ language the meaning whereof is not in doubt. The suggestion has been made that much would be gained, and very little lost, by removing from the state constitutions all the clauses which substantially duplicate the safeguards for personal and property rights contained in the national constitution. The state courts would then base their decisions on the latter and would, as a matter of principle, be bound by the decisions of the United States Supreme Court. For a case may be appealed by writ of error to the Supreme Court of the United States from the highest state court whenever the decision of the latter upholds the constitutionality of a state law which has been attacked on federal grounds. And it may be removed to the Supreme Court of the United States by writ of certiorari whenever the decision of any state court is against the constitutionality of a state law on federal grounds. Thus there would be a means of securing a uniform interpretation of the federal guarantees throughout the whole country.

At any rate there is a widening sentiment, even among men who are accustomed to think soberly, that the courts have too much latitude in nullifying the laws. A few states are attempting to remedy the situation by requiring that the supreme court of the state, in declaring a law unconstitutional, must be within one vote of unanimity. But that is not the right way to go about it. The root of the evil lies in the redundancy and loose wording of the state constitutions and in the slovenliness with which many of the state laws are drawn. Judicial reform ought to be part and parcel of law reform and administrative reform.<sup>1</sup>

<sup>1</sup> Such books as F. N. Judson's *The Judiciary and the People* (New Haven, 1913); W. L. Ransom's *Majority Rule and the Judiciary* (New York, 1912); W. S. Carpenter's *Judicial Tenure in the United States* (New Haven, 1918); A. A. Bruce, *The American Judge* (New York, 1923), and Moorfield Storey's *Reform of Judicial Procedure* (New Haven, 1911), bear on the foregoing discussions.



## CHAPTER XXXV

### STATE PARTIES AND PRACTICAL POLITICS

Along with constitutional government the American citizen must study the extra-constitutional system. Its body and soul are to be found in the political parties.—*M. Ostrogorski.*

In its party organization as well as in its frame of government each state of the Union is an independent unit. The states control all such matters as the suffrage, the methods of nomination, the settlement of electoral disputes, and even the mechanism of the parties themselves. The system of party committees, the methods of raising and spending party funds, and many other essentials of party organization are determined by the state laws. In matters affecting the machinery and work of its political parties each state has complete self-government. It is the state legislature that determines how the delegates to the national party conventions shall be chosen, in other words, how candidates for the presidency shall be nominated. Even so well-posted a student of American government as Woodrow Wilson seems to have overlooked this fact when he proposed that Congress should pass a law establishing a nation-wide presidential primary. In the Constitution of the United States there is no grant of power, express or implied, under which Congress can regulate the party system in the states. This aspect of state self-government, to wit, party independence, has not always received the emphasis it deserves, but it is important because the party system, as Lord Bryce once remarked, is the power which sets and keeps in motion the wheels and pistons of representative government.

Since each state is independent as regards the organization and machinery of its political parties, it is quite conceivable that each might develop and maintain a different system from the others, that each might have its own set of political parties based upon state issues and in no way connected with party

Theoretical  
autonomy  
of state  
parties.

But state  
and  
national  
parties  
have  
become  
identified.

organization in other states. But that is not what has happened. The same party divisions normally exist in all the states, and these divisions are not determined by state issues. Popular interest in questions of national policy has overshadowed, on the whole, popular interest in matters with which the individual states have to deal. The consequence is that a single broad line of political cleavage has run its course right through the nation from end to end. Party lines in the nation and in the states have become for all practical purposes identical, and it is national issues that determine them.

With a  
few tem-  
porary  
exceptions.

To this general rule, there are, no doubt, some exceptions. A political party may prove itself, in any state, stronger or weaker in national than in state campaigns. But when this occurs it is usually due to some abnormal circumstance such as the injection of a non-partisan issue, or to dissensions within one of the parties, or to some other factor which causes a partial breakdown of the regular party lines for the time being. In the normal course of events the strength of a political party is approximately the same in state and national affairs, although there is rarely any connection between the political issues in the two fields of government.

Reasons  
for this  
identifica-  
tion of  
state and  
national  
parties.

The reason for this identification of state and national party lines is to be found in the fact that during the first twenty-five years after the formation of the Union many national questions of great importance forced themselves to the front, while political affairs within the states commanded very little public interest. These national issues ranged the people into two great political parties, and since it was not practicable to create and keep in operation two separate sets of party divisions, one based on momentous national issues and the other on commonplace questions of state government, the natural result ensued, namely, that the greater engulfed the less. The national parties during the opening years of the nineteenth century did not wipe out the state organizations, but merely swallowed them.

They have remained engulfed. The allegiance of the average voter is to one of the national parties. His connection with the same party in the state is merely incidental to the larger allegiance. A Republican in Montana feels a kinship with a Republican in Rhode Island, nearly three thousand miles away, although neither may know anything about the local issues

which concern the other. There have been times during the past hundred years when local issues in various states have taken the uppermost place in the minds of the electorate; but no permanent shattering of the established party lines has resulted. Tradition is the strongest of all factors in determining party allegiance.

It is commonly said that men and women "choose" the political party to which they belong. As a rule they do nothing of the sort. The great majority of them inherit their party allegiance. The most important factor in determining whether a new voter will identify himself with one party or the other is the political allegiance of his parents. The child of Republican parents does not ordinarily grow up a Democrat. Probably eighty per cent of our new voters take their political beliefs, like their religion, as a by-product of parental influence.<sup>1</sup> Hence a state may remain overwhelmingly in the control of one political party through successive generations, although the issues have changed again and again. Party lines may be originally determined by issues; but they are perpetuated by inheritance.

Parental influence is not the only factor, of course. The new voter is sometimes drawn into one political party or the other by influences which arise from his social and economic surroundings. He finds that nearly all his friends are Democrats, and he goes with them. Or he becomes associated in business with men who are Republicans and swings into their ranks. Leadership and personalities also figure in the process. Admiration for a leader of strong personality will draw many voters to the

The influence of heredity on party affiliations.

The influence of association.

<sup>1</sup> This statement is not based on mere conjecture. Each year for many years I have taken a poll of my classes at Harvard in order to ascertain what proportion of the students intend to affiliate with the same political party as their parents. Save for temporary lapses during the third-party upheavals of 1912-1915 and 1924 the proportion has run between 80 and 90 per cent. These young men, all of them nearing the age at which they will become voters, have been drawn from every part of the country, from every social class, and from all the political parties. The disposition to political independence is probably more marked among college men than it is throughout the country at large, so that the influence of heredity upon political allegiance would in all probability prove to be greater there if it could be accurately measured. In my inquiries, which have included several thousands of young men, I have been able to find no greater departure from parental influence in politics than in religion. During the past twenty years Professor Charles E. Merriam, of the University of Chicago, has also made numerous tests to determine the percentage of hereditary voters and has found that it runs from 65 to 85 per cent. (*American Party System*, p. 27.)

party which he leads; while aversion to a leader may cause many desertions. James G. Blaine drove thousands of life-long Republicans into the Democratic ranks, while Theodore Roosevelt changed a good many Democrats into Republicans and then transformed a host of Republicans into Progressives. Principles, policies, and platforms are to some extent influential in making converts for the party, but to no such extent as is commonly supposed. The number of new voters who choose their party by studying the various platforms is negligible, and the number of older voters who are impelled to change their party allegiance through dissatisfaction with principles or platforms is not ordinarily large although on occasions it may become so, as it did in the national elections of 1896, 1920 and 1924. Were it not for the overpowering influence of parentage and tradition the party lines in the nation and in the states would not have coincided so closely and for so long a time.

**Organi-  
zation of  
state  
parties:**

**1. The  
state  
committee.**

Not only are party lines identical in all the states, but party organization and methods are much the same everywhere. The central organ of the party in the state is a state central committee. This is made up of committeemen chosen directly or indirectly by the party voters in the various districts of the state, one or more from each district. The districts used for this purpose vary from state to state, and indeed different parties within the same state may not use the same districts for the selection of committeemen.

**Functions  
of the  
state  
committee**

What are the functions of these state central committees? In general they see that the local party organizations both in the cities and in the rural districts are kept alive, and that they attend to such matters as the registration of the party voters and the proper distribution of local patronage. In a word it is the function of a state committee to keep the whole party machine in repair and in running order. Between election campaigns the committee does not meet very often; its functions during these periods of political quiescence are exercised usually by the committee's chairman, or secretary, or both. The only questions likely to be of interest to the individual members of the committee in this interval are those which relate to appointments. When the time for an election draws near, however, the committee limbers up and makes the party's campaign plans, often determining when and where the party convention shall



be held, and how funds shall be raised. Sometimes it quietly hand-picks its own slate of candidates. It matters little whether the actual nominations are to be made by the convention or by means of a primary election; in either case the state committee is likely to make the preliminary selections, and under normal conditions its action will be ratified. During the campaign the committee serves as a general board of strategy, arranging for the chief speakers, soliciting contributions and apportioning the available money for expenses, preparing and issuing the campaign literature, and so on. Most of the actual work is done by the chairman or the secretary of the committee in coöperation with the local party committees all over the state, but the committee itself usually decides all questions of campaign policy. Sometimes it even frames the party platform.

While the chairman of the state central committee is nominally the head of his party organization in the state, he is not always the real leader or party boss. He may be such, it is true, but more often he is a figurehead who takes the chairmanship at the behest of someone else who desires to exercise the real authority without having the spotlight of publicity thrown upon him. The secretary is usually a paid official, an energetic worker with a capacity for handling details. The state committee also has its treasurer, upon whom devolves the duty of helping to raise the campaign funds, paying the expenses, and finding some way to liquidate the inevitable deficit after the election is over. This last problem, it need scarcely be added, is less difficult when the party wins than when it loses. A victorious party, with preferment and patronage in its gift, rarely lacks plenty of good angels.

Its chairman.

Mention has been made of the state party convention. Ordinarily each party holds a convention some time prior to the state election. This convention is made up of delegates who represent the party voters in the various municipalities or districts of the state. They may be chosen by counties, districts, or by smaller areas, and the method of selection is regulated either by the rules of the party or the laws of the state. For the most part the delegates are now directly chosen by the voters of the party at the primary elections. When the convention meets, it chooses its own chairman and proceeds to business. Each party, of course, has its own convention.

The state party convention

The state  
party  
platforms.

Until about twenty years ago these state party conventions not only framed the platforms of their respective parties but nominated all the candidates for governor and other state-wide offices as well. But the conventions have now lost this nominating function in most of the states. Popular dissatisfaction with the work of the conventions became so widespread that direct primaries were established to do the nominating. Where this change has been made the candidates are chosen by the voters of each party at a direct primary election and not through the intermediary of delegates. In that case the convention has very little to do except to draft and adopt the party platform.

This is not usually an arduous task. National party platforms are often indefinite and evasive on the important issues; state party platforms are even more so. They aim to put their "planks" in a form that will antagonize nobody. They "point with pride" to everything the party has done, and they "view with alarm" whatever the opposing party proposes to do. They are well studded with patriotic platitudes and replete with all manner of irrelevancies—such as comments on matters with which the state government has nothing whatever to do. The party leaders try to agree upon the various "planks" in advance and when they are successful the convention merely ratifies their decisions. Obviously the best way to secure this harmony is to keep out of the platform everything that offends any element in the party, thus making it largely an array of resounding phrases which mean little and commit the party to even less.<sup>1</sup>

The local  
organiza-  
tions.

The state central committee and the state convention are by no means the only cogs in the party machine. Their work is of

<sup>1</sup>Take this example, culled from one of them: "Pointing to its history and relying on its fundamental principles, we declare that the Republican party has the genius, courage and constructive ability to end executive usurpation and restore constitutional government; to fulfill our world obligations without sacrificing our national independence; to raise the national standards of education, health and general welfare; to reestablish a peacetime administration and to substitute economy and efficiency for extravagance and chaos; to restore and maintain the national credit; to reform unequal and burdensome taxes; to free business from arbitrary and unnecessary official control; to suppress disloyalty without the denial of justice; to repel the arrogant challenge of any class and to maintain a government of all the people as contrasted with government for some of the people, and finally, to allay unrest, suspicion and strife, and to secure the coöperation and unity of all citizens in the solution of the complex problems of the day; to the end that our country, happy and prosperous, proud of its past, sure of itself and of its institutions, may look forward with confidence to the future."

a general nature. They plan and draft and supervise. The actual work of getting the voters registered, organizing them, rallying them to meetings, arousing their enthusiasm, and bringing them to the polls is done by all manner of subordinate committees which usually exist in each county, district, city, town or township. When the party is thoroughly organized this committee system extends to the wards of the cities, or even to the precincts within the wards. Members of the local committees are chosen in a variety of ways: by the voters at direct primaries, by caucuses, sometimes they are virtually self-perpetuating. But their functions are everywhere the same. They are made up entirely of active party workers. State conventions and committees may provide the platform and the funds; the direct primary may select the candidates; but the active work among the voters must be done by local organizations. It is upon them, accordingly, that victory in a close campaign usually depends. The proof of good state leadership is to be found in the efficiency with which the organization functions in its lower ranges.

In addition to the local committees there are various ancillary organizations, particularly in the cities. These take the name of leagues or clubs, and their main purpose is political although they may have some social activities as well, especially in the intervals between election campaigns. Groups of voters belonging to a party organize themselves together, secure a hall or other headquarters, and make it their place of rendezvous. They have some recognized leader as the moving spirit of the organization, and the members make up his personal following. When a party is well organized there will be at least one of these "clubs" for every ward in the city. The members are supposed to pay a fee of ten cents a week, or some such nominal sum, but no one will ever be dropped for non-payment of dues so long as he votes regularly and votes right. The leader makes up the deficits.

There are good reasons for having these guerilla bands outside the regular party organization. Not all the party workers can be given places on the local committees. The clubs or leagues afford opportunities for many others who are ready to help in an unofficial capacity. Moreover, these associations can do things which a regular party committee might hesitate to do. The activities and expenditures of the regular committees must be conducted strictly according to law, but the clubs are not hampered

Ancillary  
party  
organiza-  
tions,  
leagues,  
and clubs.

Reasons  
for their  
existence,  
practical  
and psycho-  
logical.

in their operations. The party welcomes their help, but it can also disclaim responsibility when the need arises. Last, but not least by any means, is a very human consideration. Man is by nature a clubable creature; he likes to fraternize with others; he does not mope by himself if he can help it. Here is a way to gratify his desire for companionship and recreation. The ward club provides a warm place where one can go on cold evenings, play a game of pool or poker, and perhaps wheedle a nip from somebody's pocket flask. Not much of a club, some may say; but it is all that thousands upon thousands of the city's wage earners ever find available. These men are bound by a common loyalty, a personal loyalty. They are inspired by common motives and hope to make a common cause victorious.

Almost everywhere in the discussion of state or city politics you will hear references to "the machine." What is a political machine? It is something that cannot be explicitly defined, for it varies in structure from state to state, from city to city. In general the active party workers, the leaders and the higher committeemen, the chairmen and bosses, the heads of ward clubs, are cogs in the machine. There are big machines covering the whole state, and little machines that cover only a small area. There are personal machines which are virtually owned and operated by some single leader or boss. They go into motion whenever he presses the button. There may be two or three of these personal machines within the same party, each in rivalry for control but all of them usually in alliance when the campaign arrives. The outstanding characteristic of a political machine is not its size or form but the smoothness with which it functions. When a party organization becomes so thoroughly articulated that it works with machine-like precision (so long as it is well lubricated financially) we call it a machine. It may be the regular organization brought to perfection, or it may be something developed as a tangent to this organization.

Political machines exist in America only. There are party "organizations" in other countries, but they are not called machines and do not deserve the name, for they possess no such smooth articulation nor are they held so well under central control as are the political machines of the American states. They are loosely constructed; they do not always respond when they are needed, and they often go to pieces when the election

The  
machine.

A purely  
American  
institution.



campaign is over. English and French politicians have tried to build up machines, but with very little success. America remains the classic land of machine politics. Yet the development of the machine in America is not an accident. Various conditions and circumstances have contributed to its upbuilding.

Among these causes the most important is the frequency of elections, due to the fact that so many officials of state government are elective and hold their posts for short terms. In no other country do elections come so often. No sooner do the echoes of one campaign die away than the preliminaries begin to be arranged for the next. The result is that those who look after the party's interests have time for little else. It is a continuous performance; those who take part in it enter a profession. A fraternity of professional politicians is the outcome. The professional politician is more in evidence among Americans than among Europeans, for the simple reason that Americans provide far more for him to do. If political campaigns came only once in four or five years, it would not be easy to keep party organizations in full working trim from election to election. But when voters are called to the polls at least every year for some form of election, and sometimes even twice or three times a year, the political leaders are never accorded a long vacation. The American political machine would rust in other countries.

The system of political patronage has also had its part in creating the machine. Patronage is of two sorts, offices and favors. The distribution of offices under the spoils system, by which party heelers are rewarded with lucrative appointments, has been a natural incentive to political diligence. State and local committeemen, organizers of clubs and rallies, henchmen, heelers, and all the other votaries of the machine, do not give days and weeks to their work from motives of pure patriotism. They are inspired by a lively sense of favors to come. The man who serves the machine without hope of reward is a rarity, so rare a creature that he ought to be protected by the game laws. The machine owes its sustenance to patronage, much of which comes in the form of appointments, promotions, jobs, anything that will effect a short circuit between the politician's pocketbook and the public treasury.

But there is another form of patronage, and although it has had less prominence in public discussion it is very influential in

Why it has evolved in the United States.

1. Frequency of elections.

2. The nourishment of patronage.

Its two forms:

Official patronage.

Unofficial patronage.

its contribution to the vitality of the machine. This form of patronage includes the controlling of legislation for the benefit of railroads, street railways, gas, electric, water, telegraph and telephone companies, banks, industrial concerns—the great array of “interests” which stand to profit from laws of one sort and to lose from laws of another. The machine may serve or blackmail these various interests as political strategy dictates. In either case it usually exacts its price. Political patronage includes also the awarding of contracts for public works and the bestowal of favors in a multitude of other ways. It is not from those who aspire to places on the public payroll that all the money which keeps the machine in operation is usually obtained. Not by any means. It comes from public service corporations, or if corporations are prohibited by law from contributing to party funds, it is supplied by individuals who are known to be in touch with them. It comes from contractors, from those who have supplies which they desire at some favorable opportunity to sell to the state or the city. It comes also from bootleggers, gamblers, tax-dodgers, and from that great variety of other sources where the quest for public favors is the mainspring of generosity. The machine, in a word, flourishes because the system of practical politics which exists in most of the states provides the sinews of war in the form of patronage. Civil service reform has done something to minimize this evil, and strict laws relating to the competitive awarding of contracts have also helped in some measure. Yet valiant party service and free-handed contributions to the party chest continue to be recognized as the surest passports to official favor.

3. Other factors which have helped the growth of political machines.

Other factors have also, no doubt, contributed to the evolution of political machines in America. The presence of newly naturalized citizens in large numbers, particularly in some of the eastern states, has been an incentive to thorough organization. Assiduous party propaganda counts for much with these voters who have not, like the native-born, inherited a definite leaning towards either one of the regular parties. The long ballot with its party columns and its consequent premium on voting a straight ticket has also played into the hands of the machine. The apathy and docility of the rank and file of the voters, which is probably more pronounced in the United States than in most other countries, may also be a contributing factor. The political

machine exists because conditions of environment have been favorable to it.

The head of the machine is usually known as the boss. He is the man who gives the orders. Bossism, of course, is neither a modern nor an American product—there have been bosses since the days of Pericles. It is the excellence of his work, not the nature of his position, that has brought the American boss into world-wide prominence.<sup>1</sup> Leader and boss are often used as interchangeable words in the vernacular of practical politics, but it is not accurate to employ them in that way. A leader has a position which is clearly defined by law or by the rules of the organization. He has definite duties and a direct responsibility which he cannot conceal. His acts are performed in the open. A boss, on the other hand, while he may be a party official, does not derive his power from that fact. His authority comes through informal and undefined channels; he uses his machine for personal as well as party ends; and he does not owe any real responsibility to the rank and file of the voters.

The boss.

Bosses and leaders distinguished:

1. in responsibility.

In methods also, as well as in responsibility, leadership and bossism are different. The leader appeals to the sense and reason of his followers; he tries to inspire and persuade. The boss does not argue, for he is a feudal overlord by divine right. As a rule he brooks opposition with as little patience as a cosack ataman. Yet bosses are not all alike in their political methods. They differ as widely as men in any other profession. The newspaper cartoons always portray the boss as a beetle-browed fellow with a piratical look, wearing a checked vest and a flashing diamond. But the boss does not look or dress like that in real life. Not infrequently he is a man of education whose close friends are among the captains of industry and who is quite indistinguishable from them. You cannot dogmatize on any matter relating to the boss, his appearance, his ancestry, his education, his affiliations, his methods, or even his ideals. There are both silent and garrulous bosses, strict and lenient ones, bosses who are in the game for profit and those who aspire to power alone. A successful boss must adjust himself to the characteristics of the community in which he works—ability to do this is the only absolutely essential quality that he must have.

2. in methods.

<sup>1</sup> See the chapter on "The Boss in Politics," in the author's *Personality in Politics* (New York, 1924).

He becomes a boss by a process of natural selection and it is all a matter of the survival of the fittest.

Rings.

Groups of bosses are known as "rings." A boss prefers the monarchical form of government, with himself on the throne, but this type of rule is not always practicable, in which case the monarchy becomes an oligarchy of several bosses. Rings are powerful so long as the members work together, but eventually they almost always disagree and then the ring goes to pieces. The two most famous rings in American political history were the Tweed Ring which dominated New York fifty years ago, and the Gas Ring which held Philadelphia in its clutches a little earlier.

The political circumstances which have encouraged bossism in America.

Many denunciations have been showered upon bosses and rings; but both are logical products of political conditions which have existed in most American states and cities until recent years, and which still continue in some of them. Discipline helps to win elections as well as battles, and good discipline cannot be maintained except by lodging vast final powers in the hands of a shrewd, active, and experienced commander-in-chief. The man who is best fitted to organize the party fighters, to drive them forward at top speed, to dole out the funds where they will do most good, and to provide whatever strategy the campaign may demand is not always the one whom the party cares to put on a pedestal as its official leader. Far better it is, in such cases, to have someone of irreproachable record and demeanor in the post of technical leadership, leaving the real power to a Warwick behind the throne. There will be bosses in American politics so long as government by patronage, the spoils system, the multiplicity of elective offices, the long ballot, the frequency of polling, the lobby, the policy of legislation by trade and bargaining, the gerrymander, and a dozen other iniquities combine to place at a disadvantage the leader who insists upon fair and open methods of electoral combat. "I shall win," said a ward boss on one occasion, "because I am ready to risk the penitentiary to win, and the other fellow isn't."

The remedies for boss rule.

The cure for bossism is in the eradication of the things which have brought it into being. The reduction in the number of elective offices, the use of the short ballot, the extension of the merit system to all subordinate appointments and to all promotions, the simplification of nominating and election machinery,



the practice of requiring all campaign contributions and expenditures to be made public, the placing of all public contracts on an open-competition basis, the purchase of all supplies by public tender, the extermination of lobbying in legislatures, the extension of social service facilities in the crowded sections of large cities, and the encouragement of civic education—these reforms have helped and are helping to rid the states of boss politics. Such riddance, moreover, is in the highest degree desirable, for no political system can be really democratic so long as it suffers any man to exercise large political powers without formal authority or responsibility. The boss system is a perversion of party government.<sup>1</sup>

A clear distinction should be made, however, between these excrescences upon the party system and the system itself. Too often the merits of party organization are wholly disregarded. Its lapses are made the theme of sermons and editorials which advocate the ruthless harrying of all party organizations. That is like urging the abolition of bank notes because they are sometimes counterfeited, or of newspapers because some of them print libels. The founders of the American republic had an aversion to party politics, as well they might, for party struggles were associated in their imagination with the old factional conflicts of the Greek and Roman republics, of Guelphs and Ghibellines in the Middle Ages, and of Cavaliers and Roundheads in seventeenth century England. These were party struggles in which bloodshed, conspiracy and banishment figured as part of the day's work. But the history of nations during the last hundred years has shown that party contests can be conducted fairly, on clear-cut issues, and without personal malice. It has proved, moreover, that real democracy can nowhere exist without party organization. These lessons, as President Lowell has said, represent the greatest single contribution of the nineteenth century to the art of free government.

Ridding the land of bosses does not mean the abolition or weakening of the party system.

<sup>1</sup> Several readable books have been written on practical politics, bossism and kindred topics in recent years. Mention may be made of Samuel P. Orth's *The Boss and the Machine* (New Haven, 1918); Frank R. Kent's *Great Game of Politics* (New York, 1923), and R. C. Brooks' *Political Parties and Electoral Problems* (New York, 1923). The best extended account of a political machine is that given by Gustavus Myers in his *History of Tammany Hall* (2nd edition, New York, 1917).

## CHAPTER XXXVI

### THE RECONSTRUCTION OF STATE GOVERNMENT

No government can expect to be permanent unless it guarantees progress as well as order; nor can it really continue to secure order unless it promotes progress.—*John Stuart Mill.*

State government has been less satisfactory than is commonly realized.

Surveying American state government as a whole, what are its most obvious defects and by what steps may they be remedied? There is a widespread but not at all well-founded impression that state government in the United States has been tolerably satisfactory. One reason for this, no doubt, may be found in the fact that the government of cities has been so much worse. The cities have engaged most of the reformer's attention. The shortcomings of state government, moreover, have been to some extent screened and retrieved by the relative excellence of the federal system. By the steady expansion of its authority the national government has taken over many functions which, had they been left to the states, would undoubtedly have been handled so badly as to bring the defects of state government into bolder relief.

Reasons for this situation.

The shortcomings of state government are due in part to faulty organization. But this does not mean that the thirteen original states framed their constitutions unwisely. They began with a scheme of government which was well suited to the needs of pioneer communities in the closing years of the eighteenth century. The chief and almost the only function of a state government in those days was to make laws. But the making of laws has long since ceased to be the chief work of the state. Executive functions have expanded steadily and enormously. Administration in all its branches, particularly in its application to social, economic, and humanitarian activities, has grown to huge proportions and now quite overshadows all else.

Yet the states are carrying on with the old machinery. They are trying to conduct great business enterprises with an organiza-

tion which was designed for the making of laws and for the general safeguarding of popular liberties. The old machine has been patched up, added to, and otherwise tinkered with, so that it has not entirely broken down under the new load; but in no state has it been entirely overhauled and reconstructed.

The tinkering process has been carried on mainly by means of constitutional revision and amendment. Most state constitutions are easy to change. So easy, in fact, that changes are made almost every year. Sometimes as many as a dozen proposed changes appear on the ballot at a single election. Things are put into the constitution one year and taken out the next. The state constitution in such cases becomes an ephemeral affair, without any real stability, and devoid of that halo which is supposed to surround supreme law.

Back in the middle of the nineteenth century it was customary to make fun of the French people for revising their constitutions so frequently. American state constitutions are open to the same criticism. A new edition is needed annually. Details of governmental organization, even the salaries of officials, clutter up their pages. Limitations of every conceivable sort are crowded into these documents until the legislature, the governor, the administrative departments, and even the courts find themselves without sufficient elbow room for the satisfactory performance of their respective duties. The demand for changes in this or that detail is incessant. The reconstruction of state government should begin, accordingly, with the state constitution itself.

Constitution-makers should return to the true purpose and the proper scope of a constitution, which is to set forth the basic principles of government, not to provide a code of law. There is no need for this relentless piling on of limitations. Neither the liberty of the individual nor the welfare of the community demands it. The limitations which stand in the federal constitution are relatively few, yet who will say that the rights of the citizens are not well guarded there? Who will assert that the states, with their constitutions a hundred pages long, have more effectively precluded the abuse of legislative, executive, or judicial power?

The time has come, moreover, for a resurvey of the doctrine of checks and balances in its practical workings. During the second half of the nineteenth century it was accounted a political

State functions have outgrown the old machinery.

The essentials of a satisfactory reconstruction:

1. Fewer constitutional provisions, especially in the way of limitations.

The need of a return to first principles in constitution-making.

2. Less  
reverence  
for the  
formula  
of division  
of powers.

heresy to question the infallibility of this dogma. It was hailed as the very corner-stone of American democracy. To get rid of it seemed an impossibility. As well might one move to repeal the law of gravitation. To-day, however, this attitude is visibly changing. Montesquieu's aphorism that "power must be a check to power" has been repudiated in several hundred American cities, and is now being rudely assailed as an obstacle to the efficient government in some of the states as well. Not alone political philosophers but men of long experience in the actual work of state administration are asserting that the triple division of governmental powers is a hindrance to responsible government.

A government organized upon the principle of checks and balances derives both strength and weakness therefrom. Division of powers makes for safety. It provides the ship of state with water-tight compartments. When one compartment floods, the others hold firm, keeping the craft afloat and on its course. So long as the balance of powers is preserved, no one branch of government can arrogate to itself any dangerous excess of authority. But, on the other hand, the triple division of power means that there can be no full concentration of responsibility for what is done. The public interest suffers whenever the three departments fail to work in harmony and the community as a whole has no effective leadership.

Is it well that these three great essentials of good government, responsibility, harmony, and leadership, should be sacrificed for the assurance of safety? In the case of the national government that question might well be answered affirmatively, for its establishment represented a novel and precarious experiment. The states were asked to give over great powers and they were wise in taking no chance that a despotic exercise of this vast authority should some day dissipate all that the Revolution had won. They had not shaken off a hereditary despotism in order that they might establish an elective one in its stead. Safety was the first consideration in planning the national government. One of the prime objects of the national constitution was "to secure the blessings of liberty to ourselves *and our posterity.*"

But in the case of the state governments there has never been any such strong reason for establishing a safeguard against despotism. The national constitution guarantees to every state

Merits and  
defects of  
this for-  
mula in its  
practical  
applica-  
tion.



"a republican form of government," which means that the whole strength of the Union is available to protect the people of each state from any gross infringement of their liberties. So long as a system of free government is maintained in the nation as a whole, the danger of despotism in any state is altogether fanciful. The chief argument in favor of division of powers in state government thus falls to the ground.

In state government the merits disappear.

On the other hand the disadvantages of the divided system are far greater in state than in national government. Administration bulks relatively larger in the states and includes matters of a far greater variety. The party system, moreover, which has served to provide a coördinating force in national affairs, has not succeeded in doing so to the same degree at the state capitals. Finally, the states have pressed the principle of checks and balances to an extreme length, establishing a division of powers not only as between the legislative, executive and judicial organs of government but even within the executive branch itself. In the national system the President remains the supreme administrative authority, sharing his powers with no one else. But the state governor, as has been shown, occupies no such position. Administrative authority in most of the states has become so hopelessly divided that it may fairly be said to represent a system of checks and balances carried to an absurdity.

And the defects are magnified.

It would appear, therefore, that division of powers is not needed by the states in the interest of safety, that it impairs the responsibility of state government to the people, that it stands in the way of vigorous political leadership, that it has been blindly carried to an extreme in the decentralizing of executive power, and that it should give place to some plan of concentrated authority.

The logical conclusion.

But by what type of organization might the present system be replaced? Two courses are open. The legislative branch of state government might be restored to a position of supremacy and given full control of the executive, or the powers of the executive might be so increased as to make the legislature a subordinate branch of state government. The former alternative would seem to be not only more in harmony with the American temperament, but in keeping with the practice of responsible government in other countries. But there is no likelihood that this alternative will be adopted. The development of American

But if the division of powers be abandoned, what then?

state government during the past fifty years has been entirely in the other direction. The legislatures have nowhere been increasing their control over the executive; they have been sinking to a secondary place in the control of public policy. Constitutional conventions have been circumscribing their sphere of influence while the progress of the executive branch to greater prestige and power has gone forward unchecked. The executive branch of state government is nearly everywhere the more vigorous, the more influential, and the more secure in public confidence to-day. It is altogether unlikely that this movement can be halted and a march begun in the opposite direction. Whatever the logic of the situation, one must face the obvious fact that a distrust in the capacity and in the integrity of legislatures is prevalent in all parts of the country and among all classes of the people. Proposals to widen the powers of the state legislature find little support anywhere; proposals to limit its powers seem almost always to command the popular favor. Note the way in which the movement for budget reform has taken from the legislature most of its initiative in finance and has given this, in many states, to the executive. There are astonishingly few people (except the legislators themselves) who look upon the state legislature with much seriousness. In addressing a public audience you can always please and amuse your hearers by raillery at the men who are making the laws of the state. Popular respect for the legislative branch of state government is steadily declining. There are indications of it on every hand.

The  
initiative  
defined.

One of the most notable among these indications is the spread of the initiative and referendum which afford a means by which the people can make their laws directly, without the intervention of the state legislature. The initiative is a device by which any person or group of persons may draft a proposed law or amendment to the state constitution, and by securing in its behalf a designated number of signatures may require that the proposal be submitted to the voters; and if it is approved by a majority it goes into effect. In some cases the requirement is that the measure, having been duly signed by a sufficient number of voters, shall not be submitted to the people until the legislature, after due opportunity, has declined to accept it.

The referendum, on the other hand, is an arrangement whereby any measure already passed by a legislature may, under certain

circumstances, be withheld from going into force until the people have had an opportunity to express their opinion on it. The circumstances under which withholding is necessary are various. Under the *optional* referendum the legislature may or may not submit a measure to the people as it sees fit. Under the *compulsory* referendum a measure must be so submitted whenever a designated number of voters by petition request that this be done. The term referendum, when used without any qualifying adjective, customarily refers to this compulsory arrangement, namely, submission whenever required by petition. A distinction may also be drawn between the *constitutional* referendum, which is the referendum applied to proposed constitutional amendments only, and the *statutory* referendum, which applies to laws only, not to constitutional changes.

The referendum defined.

Different types of referendum.

The initiative and the referendum logically go together and supplement each other. The initiative is a positive instrument of legislation; it can be used to set the wheels in motion. The referendum, on the other hand, is negative in its operation; it gives the people a potential veto upon laws enacted by the legislature. It permits the voters to have the last word.

Inter-working of the two.

The first American state to adopt the initiative and referendum as regular instruments for the making of laws was South Dakota. In a general way it copied the system used by the cantons of the Swiss Republic. Other states followed soon after, Utah in 1900, Oregon in 1902 and so on.<sup>1</sup> To-day about half the states have provided for direct legislation in some form or other. In the early stages of the movement its progress was entirely in the western states, and even yet its main strength lies west of the Mississippi. Maine, Ohio, Michigan, Massachusetts and Maryland are as yet the only converts in the eastern half of the country. As movements of such fundamental importance go, however, its spread has been astonishingly rapid.

Spread of the system in the American states.

How is this remarkable progress of direct legislation in the states of the Union to be accounted for? There has been no

Reasons for this spread.

<sup>1</sup>The full list is as follows: South Dakota, 1898; Utah, 1900 (amended 1917); Oregon, 1902; Nevada, 1904; Montana, 1906; Oklahoma, 1907; Maine, 1908; Missouri, 1908; Arkansas, 1910; Colorado, 1910; Arizona, 1911; New Mexico (referendum only), 1911; California, 1911; Nebraska, 1912; Washington, 1912; Idaho, 1912; Ohio, 1912; Michigan, 1913; North Dakota, 1914; Mississippi, 1914; Maryland (referendum only), 1915; Massachusetts, 1918.

such development in other great countries having representative systems of government, such as Great Britain and France. The new German constitution contains provisions relating to the initiative and referendum but they are so cumbersome as to be practically unworkable. The chief reason for the wide and rapid spread of direct legislation in America can only be found, as has been said, in the impatience of the people with the work of their state legislatures. The people, surveying this work, have been driven to the conclusion that by their own direct action they could hardly do worse, and might be better. They have done just what the *demos* always does in such circumstances. When democracy seems to be working badly they do not shorten sail; they swallow the assurance that "the cure for the evils of democracy is more democracy," and set more sail to the wind. It is an axiom of practical politics that the people will never shoulder the blame when things go wrong; they will find a scapegoat in some leader, some law, or some method of doing things. They will change leaders, change laws or methods, but never will they put the blame on their own apathy or shortsightedness. When the representatives of the people prove incompetent or corrupt, year after year, it is the voters who are to blame, for they are the masters of the government. But the voters never see it in that light. They hold to the doctrine of electoral infallibility. You cannot indict a whole nation, said Burke, and of course the whole people will never indict themselves.

A word as to the actual workings of the initiative and referendum. They are attended by various formalities. No two states have exactly the same requirements, although there is a similarity in essentials. The mode of initiating a proposed law is everywhere by petition; the method of enacting it (if the legislature does not act in the meantime) is by popular vote. Between the starting of a petition, however, and the ultimate decision of the people at the polls there is a considerable intervening procedure which will be summarized in the next few paragraphs.

The first step in the exercise of the popular initiative is the framing of a proposed law or constitutional amendment. This may be done by any one; but it is usually undertaken by some organization. A proposed measure relating to labor, or agriculture, or prohibition, or woman suffrage, for example, is cus-

The  
mechanism  
of direct  
legislation.

1. The  
initiative  
petition.



tomarily initiated by bodies which represent such interests or movements. Then comes the quest for signatures. From five to ten per cent of the qualified voters is the usual requirement where a law is proposed; a higher percentage (from eight to fifteen or even twenty per cent) is ordinarily required if the proposal is for a constitutional amendment. In some cases, however, the percentage is the same for both. If, accordingly, there are a half million qualified voters in the state, the number of required signatures will be from twenty-five thousand to fifty thousand according to the percentage stipulated. Each state has its own rule on this point, but a substantial number of signatures is everywhere essential, at any rate a number large enough to show that there is some degree of popular demand for the measure.

When a petition has obtained the requisite number of signatures it is submitted to some designated state official, usually the secretary of state, who checks the names and if he finds them sufficient makes out a certificate to that effect. Occasionally there is provision for the filing of additional signatures in case those on the original petition prove insufficient. Then the measure is placed (usually in abbreviated form or by its title only) upon the ballot at the next regular state election, or at a special election. As many measures may be placed on the ballot as are properly petitioned for, and the legislature may submit its own measures in addition. If two conflicting proposals appear on the ballot and both are approved by the voters, it is usually provided that the one receiving the highest number of affirmative votes shall become effective. Ordinarily a majority of the votes recorded upon the measure is sufficient to pass it; but in a few states it is provided that at least a designated percentage of the total vote shall be cast on the question, otherwise the proposal is not to be regarded as having been accepted by the people.

To inform the voters upon the questions submitted to them publicity pamphlets are in some states prepared and distributed before the polling. In California this pamphlet contains the text of the measures which are to be voted upon, together with the arguments for and against each proposal, these arguments being prepared by persons who are designated for the purpose from among the supporters and opponents respectively by the presiding officer of the senate. A copy of this pamphlet is mailed to every

2. The submission of proposals at the polls.

Publicity for these measures.

voter in the state. While the expense of this publicity work is considerable and a great many of the pamphlets are thrown away without being read, the plan undoubtedly aids in informing the voters and stimulates interest in the question submitted.

Resub-  
mission of  
measures.

When a measure has been adopted by the people at the polls, it cannot ordinarily be amended or repealed by any action of the legislature. No measure referred to the people and adopted by them, moreover, can be vetoed by the governor. If a proposal is rejected by the people, it may usually be brought forward by another petition the next year; but this liberty has been found to result in the too frequent submission of the same question, and a few states have made provision that a rejected measure may not be brought forward for at least three years unless a much larger than the customary number of signatures is secured.

How the  
referen-  
dum  
works.

Generally speaking, the compulsory referendum follows the same general lines so far as concerns the securing and certifying of signatures. The petition in this case does not propose a new law, but merely asks that some measure passed by the legislature be submitted to the voters before being put into effect. The question is then placed on the ballot; and if a majority of the voters indorse the measure it becomes effective; but if a majority vote adversely, it becomes as invalid as if the legislature had never enacted it.

Emergency  
measures.

The requirement that a measure passed by the legislature shall not go into force for a certain period (usually ninety days), so that opportunity may be given for filing petitions against it, might become a serious obstacle in case of emergency, as for example, in the event of war, or civil strife, or a financial panic. To meet this eventuality it is usually provided that emergency measures, that is to say "measures immediately necessary for the preservation of the public peace, health, and safety," may be put into force by the legislature at once. To guard against the abuse of this privilege it is required that the existence of an emergency shall be explicitly stated in the preamble of the measure, and that no emergency law shall be passed except by a two-thirds vote of both chambers in the legislature. In spite of these safeguards, however, the emergency privilege is frequently abused.

Summary.

In states which have the initiative and referendum, therefore, questions may be placed upon the ballot in any one of three

different ways. First, the legislature may of its own accord refer a measure to the voters for their decision. Second, an initiative petition may be presented bearing the requisite number of signatures asking that any proposed measure be placed upon the ballot either without going to the legislature at all or because the legislature has declined to pass it. Third, a law may have passed the legislature but on presentation of an adequate petition may be withheld from going into force until submitted to the people. By one or other of these ways a considerable batch of questions is every year submitted to the voters of the various states. In some the initiative and referendum are used very freely, in others they are hardly ever called into operation at all.

As to the merits and defects of the initiative and referendum there are wide differences of opinion. These "newer agencies of democracy" have now been operating in America for twenty-five years; they received during this period a trial on a sufficiently broad scale and under sufficiently varied conditions to warrant a fair appraisal of what they are worth. As a result of this experience a substantial body of facts and figures has become available. But this does not help us very much, for the advocates and opponents of direct legislation interpret these facts and figures to suit themselves. Hence they are as far from agreement as ever.

The merits  
of direct  
legislation.

The reputed merits of the initiative and referendum may be summed up under four heads. 1. *It makes government more democratic.* In legislatures the influence of some class, section, or partisan element among the people has often determined the nature of the laws. The legislators succumb to the influence of "the lobby," the boss, the machine, the "invisible government," as Elihu Root once called it. This is hardly the place to particularize among legislatures, but the presence of sinister influences upon the course of lawmaking has been far stronger than the average citizen realizes. By the initiative and referendum, it is asserted, the people regain control of their government. By the use of direct legislation the whole people can make their will effective.

The  
arguments  
in favor.

2. *It has an educative value.* The average voter takes very little interest in what the state legislature is doing. But people who are called upon to vote upon measures will learn something about them before going to the polls. When the legislators alone make the laws, the individual voter feels that he has no responsi-

bility. But when the questions go on the ballot there is a general public discussion of the arguments for and against. The newspapers devote whole columns to the issues. In this way the whole body of the voters becomes informed on public problems.

3. *It gives the ordinary citizen a chance to make his influence felt.* The legislature, in doing its work, does not hear much from the plain man who attends to his own business. It hears chiefly from the "vested interests," the corporations, and capitalists on the one hand, or from labor organizations or the farmers on the other. It is also subjected to pressure by politicians and party leaders. But a considerable part of the population is made up of men and women who are neither capitalists, union workers, nor politicians. Being unheard from, they are likely to be overlooked and forgotten. Direct legislation gives this silent section of the electorate a chance.

4. *It keeps legislative bodies on their good behavior.* The initiative and referendum are not intended to supplant lawmaking by legislatures. Most of the laws will continue to be made by the old process. Direct legislation is merely a remedy in the hands of the people for use when the regular lawmaking bodies fail to carry out the popular will. Knowing that the voters have this weapon ready for use, the legislators are more careful about what they do. They know that an appeal may be taken to the voters and their own decisions overturned. This is an incentive to better work on their part. Hence the initiative and referendum will really strengthen rather than destroy our system of representative government.

But there are arguments on the other side as well; and these also can be arranged under four headings. 1. *Direct legislation weakens the civil rights of the individual.* These rights are embodied in the state constitutions for the purpose of preserving them. But if a majority of the voters can change these constitutions at any time, there is no longer any distinction between constitutions and laws. This means that there is no special protection for the rights of property, for free speech, or for freedom of worship. A majority can ride rough-shod over a minority at any time.

2. *Direct legislation is not lawmaking by the people but by a minority of the people.* Not more than eighty per cent of the registered voters cast their ballots on election day; the proportion

The  
arguments  
against.

Defects  
of the  
system.



is often much smaller. Of those who go to the polls many give all their attention to voting for the candidates and do not concern themselves with the questions at the bottom of the ballot. Hence a measure is often adopted at the polls by the votes of only twenty-five or thirty per cent of the whole electorate—in other words by a minority of the people.

5. *The initiative and referendum merely call for the Yeas and Nays*, not for a real expression of public opinion. What the voter gets is a choice between two definite alternatives. He may desire neither of them. The system of direct legislation assumes that every voter is able and ready to give a categorical Yes or No to any question of public policy, no matter what it is. There is no chance to compromise or amend, as in legislatures. The measure must be accepted or rejected just as it stands. That, surely, is a serious defect in any lawmaking process.

Finally, *the initiative and referendum place an added burden upon the voters*, lengthen the ballot, increase the expense of elections, and are a joy to every fanatic who wants to put his hobby before the public at the public expense. You can sell an idea to the people just as you sell a brand of chewing gum or breakfast cereal, namely, by incessantly advertising it. And advertising is merely a matter of spending money. The initiative and referendum give a distinct advantage to those proponents of any measure who have the funds and are willing to use them in organized propaganda. As for the "forgotten man"—the ordinary citizen who has no one to organize him and spend money on his behalf—he does not stand to gain much from the whole proceeding.

These are the chief arguments, both for and against direct legislation, as they are commonly put forth by the two sides. The supporters of direct legislation magnify its merits; the opponents overstate its defects. Due allowance should be made for this in weighing the issue. Direct legislation has not put an end to the power of political bosses or destroyed the party system or made all the laws righteous. On the other hand it has not led to lawmaking by demagogues or impaired the fundamental rights of the citizen. Laws passed by means of the initiative and referendum have been, on the whole, no better and no worse than laws passed by legislatures. The strong probability is, if one may venture a prediction, that less use of direct

The arguments evaluated.

legislation will be made as time goes on. This does not mean, however, that the system will be valueless. It still remains a highly important weapon of last resort which the people can use if they need it. At any rate no one need hesitate to make up his own mind as to the relative merits and defects of the initiative and referendum, for he will find himself in fairly good company whichever side he takes.

Effects on  
the frame-  
work of  
of govern-  
ment.

Twenty years ago it was believed in many quarters that a general reconstruction and improvement in state government could be brought about by the use of direct legislation. The people would no longer tolerate legislative shilly-shallying and evasion. But this expectation has been in large measure unrealized. Very little reorganizing has been done by direct action of the people. Proposals to abolish the bicameral system by reducing the state legislature to a single chamber have been defeated at the polls; the voters have also, in several instances, rejected measures intended to simplify the machinery of state administration. They have preferred to keep on tinkering the old framework of government, just as legislatures have always done.

The  
recall.

Much was also expected from the recall, another device which several of the states installed some years ago. The recall may be defined as the right of a designated number of voters to demand the immediate removal of the governor, or any other elective officeholder and to have their demand submitted to the voters for decision. A petition for removal is drawn up and circulated for signatures; when enough signatures have been obtained it is presented to the proper authorities who thereupon hold an election to decide the matter. The petition usually states the reasons for demanding a removal before the end of the officeholder's term. If a majority of the voters pronounce in favor of the recall, the official steps out at once; otherwise he continues in office. Ten states now have this provision and in one instance a governor has been removed by using it.<sup>1</sup>

The purpose of the recall is to establish a stricter official accountability. It enables the people to oust any officeholder who fails to fulfill his trust. It makes official responsibility continuous and direct. On the other hand the recall is a weapon which may easily be turned to wrongful use. If used frequently and without good reason it would deter the right sort of men and

<sup>1</sup> See *above*, p. 527.

women from accepting public office at all. But it has been, in fact, very little used, whether for good or bad reasons. It is being held in reserve for emergencies, and to that practice there can hardly be much objection.

It need hardly be explained that the use of the initiative and referendum has to some extent weakened the state legislatures, although not to the extent one might have supposed. Every weakening of the legislature inevitably strengthens the executive. So it has come to pass that the people are looking more and more to the governor for leadership in lawmaking, in public finance, and in the formulation of an administrative programme. It is not that the governors are men of uncommon force or ability, but one man can lead where three hundred can not. There is every likelihood, therefore, that the executive will continue to grow stronger and that its position in state government will be relatively stronger a generation hence, than it is to-day.

Direct  
legislation  
has  
strengthened  
the  
executive.

The most urgent need in the government of the American state at the present juncture, however, does not concern itself so much with the relations of governor and legislature as with the machinery by which the vast and varied administrative work of the state is being carried on. This machinery, as has been shown, is extensive and intricate, consisting of departments, boards and officials by the score. It has been built up without plan or set purpose. In scarcely a state of the Union does the scheme of administrative organization conform to the simplest requirements of unity and coöperation. It embraces merely a heterogeneous group of disjointed authorities, with the lines of responsibility running in all directions, with powers which are ill-defined and functions which overlap, and with no means of working in unison. The situation in New York State is perhaps worse in degree but not widely different in nature from that which exists elsewhere. There, as a distinguished student of statecraft remarked a few years ago, "anybody can see one hundred and fifty-two outlying administrative agencies, big and little, lying around loose, accountable to nobody, spending all the money they can get, and violating every principle of economy, of efficiency, and of the proper transaction of business."<sup>1</sup>

The  
need for  
adminis-  
trative  
reform.

The simplifying of state administrative machinery has been

<sup>1</sup> Speech of the Hon. Elihu Root in the New York Constitutional Convention of 1915.

Proposals and progress in this direction during recent years.

The obstacles which have been encountered:

(a) Constitutional barriers.

(b) Opposition of state officials.

urged by governors in all parts of the country during the last dozen years. Their annual messages have had more to say on this than on any other topic. Legislatures have responded by appointing committees to study the question, but there the matter has usually ended. One reason for this is to be found in the fact that projects of administrative reform almost always require changes in the state constitution; for these constitutions have grown to be so all-embracing that they often prescribe not only the number, the method of selection, the tenure, and the powers, but sometimes even the salaries of the various boards and officials. In such cases the governor and the legislature, even when they agree, are powerless to do any considerable overhauling.

Even when constitutional obstacles do not stand in the way the legislatures have been slow to act. Opposition to any radical consolidation of the existing administrative departments comes chiefly from the officials of these departments themselves, a considerable proportion of whom are or have been prominent party leaders. Their influence with the legislature, when they oppose reform unitedly, is very great, and in most of the states it has proved to be the chief practical hindrance to administrative reconstruction. The consolidation of departments and boards has been attempted in many states, but in only a few instances has the attempt been successful. Illinois has accomplished more in this direction than any other state, although notable progress has been made in several others.<sup>1</sup> In Illinois there are now nine regular departments among which practically all the administrative routine has been apportioned. Each department is headed by a director who is responsible to the governor. By this arrangement all authority converges inward and upward.

Various projects for the radical reconstruction of state government have been advocated by reform organizations. The most widely-known is the plan set forth in the *Model State Constitution*.<sup>2</sup> It proposes a one-house legislature, elected every two years by a system of proportional representation. It vests the chief executive power in a governor (elected for four years) and provides that the heads of all departments shall not only be appointed by him but shall be removable by the governor at any

<sup>1</sup> In Nebraska, Idaho, Ohio, Washington, Pennsylvania and Missouri.

<sup>2</sup> Prepared and sponsored by the National Municipal League (261 Broadway, New York).



time. The governor may himself be removed by a two-thirds vote of the legislature. He and the heads of the departments are given the right to sit in the legislature, to introduce bills, and to participate in the debates, but not to vote. The number of departments is not fixed by the constitution but is left to be determined by law. Various other provisions relate to the governor's veto power, the initiative and referendum, the budget, and municipal home rule. This model constitution has been widely discussed, but no state has adopted it as a whole, nor is any state likely to do so, for some of its provisions represent too radical a departure from the traditional way of doing things in state government.

And in any case the reconstruction of state government should not be confined to official machinery alone. The party system is a vital factor in the actual workings of state government and should not be ignored. Much criticism has been bestowed upon the party system, but not all of it has been deserved. The party system, as it exists in the several states, has developed many abuses. It often proves a hindrance rather than a help to good government. But why have these abuses developed? It is chiefly because the laws have either ignored parties altogether (treating them as non-governmental organizations), or have gone after them in a hostile spirit. Rarely have the laws been framed to encourage them. Lawmakers have not appreciated the fact that parties must exist in a democracy and that the only choice is between compelling them to be helpful and permitting them to be a hindrance.

Less  
hostility  
to the  
party  
system.

No phase of American state government has had so little intelligent discussion as this. The tendency has been to look upon party politics as a soiled dove among public activities, something to be spoken of only in terms of apology or denunciation. "It is much easier," as President Lowell has pointed out, "to bring a railing accusation against men or institutions than to ascertain how far they are a natural product of the conditions in which they exist. To the scientific mind every phenomenon is a fact that has a cause, and it is wise to seek that cause when attempting to change the fact. The need of scientific investigation is as great in the case of parties as of any other phenomenon in politics."<sup>1</sup>

<sup>1</sup> *Public Opinion and Popular Government* (N. Y., 1913), p. 101.

Party organizations should be encouraged, not ignored or repressed.

The time has come, therefore, to make a truce with partyism, to take it into camp as an ally of responsible government, to recognize, legalize, and intelligently encourage it. In the reconstruction of state government the aim should not be to destroy but to fulfil. Constitutions and laws should lend their assistance to the upbuilding of strong political parties with regularized organizations. These organizations should be looked upon as integral factors in actual government (which they always are) and should be dealt with accordingly. They should be given the same measure of friendly consideration with respect to their proper and necessary functions that is accorded the courts. Constitutions and laws should be more hostile to the one than to the other. They should recognize that parties need leaders and ought to be provided with a rightful way of choosing them. These posts of leadership should be dignified, in keeping with the real power which they represent, and no longer treated as representing a species of political usurpation.

It is time to recognize, moreover, that party organizations need money, and that they should be provided with convenient and lawful means of obtaining it. The limits placed upon their expenditures ought to recognize the fact that the people like to see a real campaign and that a real campaign costs money, usually a good deal of it. In California, for example, there are more than a million voters. Suppose a political party spends only a dollar per head (for newspaper and billboard advertising, printing and mailing circulars, holding meetings and getting out the vote on election day) it will have spent a million dollars. At once there will be cries of slush fund, debauching the electorate, buying the governorship. Yet how much educating of the whole people, whether on political issues or in any other field of knowledge, is it possible to do on less than a dollar per capita? Placing an unreasonably drastic limit on campaign expenditures merely encourages resort to evasions and subterfuges. The money is spent all the same, but in ways which circumvent the letter of the law.

Finally, no program of reconstruction will assure a lasting improvement in the quality of state government if it begins and ends with laws alone. Every government is a matter of men as well as laws—John Adams and all the philosophers back to Aristotle notwithstanding. A government will be as good or as bad as men make it. The voter—not the constitution, the

6. The better enlightenment of the electorate.

governor, the legislature, the administrative system, the party or the boss—is the fundamental fact in all democratic government. If you want to reconstruct and regenerate, you must begin with him. And the difficulty about reconstructing a voter is that you have to begin with his grandfather, for he has inherited his grandfather's political ideas, traditions, whims and prejudices.

The reformers have been giving the people too many peppered chocolates. Mechanical changes in government, including the initiative and referendum, the recall, direct primaries, short ballots, woman suffrage, proportional representation, the merit system, administrative reorganization, modern methods of budget-making, city and county managers, and all the rest, may be good so far as they go; but no one of them, or all of them put together, will ever make a real democracy out of an indifferent electorate. So long as the masses of the voters remain befuddled as to the real issues at stake, so long as they are unable to discern the invisible forces which work beneath the surface, just as long will we incur the risk of having "unpopular" government, which has been well defined as "a government of the few, by the few, and for the few, at the expense and against the wish of the many."<sup>1</sup>

The maintenance of a political oligarchy does not involve the open and avowed placing of power in the hands of a class. Power, while technically vested in the masses, may stealthily gravitate into a few hands, indeed it is bound to do so unless the utmost vigilance is exercised. The inclination of all government is towards oligarchy, the Rule of the Few. That is a law of political science and of human nature. A clear appreciation of that axiom was the greatest asset the framers of the federal constitution possessed. According to their lights they set up various barriers against what they regarded as an inevitable tendency. No purely mechanical devices, however, will fully avail to prevent the perversion of democracy into a system of government by political bosses, by bureaucrats, by demagogues, or by vested interests, as the case may be. Such protection can be provided only by the political education of the voters. This work has been the last and the least among the functions of the state; it ought to be the first and most important.

The mere reconstruction of machinery will not avail.

<sup>1</sup> Albert M. Kales, *Unpopular Government in the United States* (Chicago, 1914), p. 7.

## CHAPTER XXXVII

### THE HISTORY OF LOCAL GOVERNMENT

Local institutions constitute the strength of free nations.—*Alexis de Tocqueville.*

No axiom of political science has been more abundantly verified by history than the one which stands at the head of this page. It was in the field of local government that representative institutions first developed. They arose in the English township, in the borough, and in the shire long before the government of the nation went upon any such basis. It was there that men first become familiar with the principles of civil liberty, and obtained their first lessons in free government as a practical art.

It is in local government, moreover, that representative institutions have proved the most tenacious. Revolutions may overturn the governments of states and nations, but they seldom work much change in county and town. Democracy may vanish from the governments of states and nations, but in the local communities it lives on. The Stuart kings of England could rule for long stretches without a parliament, but they never managed to smother the spirit of democracy in city, borough, and shire.

When Englishmen first came to America, their own local institutions had been in existence for at least seven centuries and had thus become a part of the national life. The spirit of these institutions, and to a large extent the form as well, they brought with them. The situation in the new world differed much, however, from that of the old, hence they had to adapt their township and county institutions to the conditions of frontier life. This adaptation necessitated a considerable change in some parts of the country, a much less extensive change in others. Three types of local government were soon evolved, all of them derivations from the ancient institutions of England.



In the New England colonies the town was the unit of local government upon which, for reasons of practical expediency, the main emphasis was laid, although counties were also organized on the English model. The settlers who came to the New England colonies gravitated into compact communities. They did this because their farms were relatively small, because the dangers from hostile Indians could be better avoided in that way, and because the untamed wilderness was at best a lonesome place in the long winters when there was very little work to do. Having congregated their dwellings together it was quite natural that the democratic spirit of Puritanism, which permeated the political as well as the religious belief of these colonists, should assert itself and find ready expression in a form of town government in which all freemen might share.

The government of the New England town was vested, therefore, in a town meeting, which at the outset consisted of all the adult male inhabitants. This meeting, which was held several times a year, elected its own moderator or presiding officer, levied the local taxes, provided for all expenditures, passed whatever by-laws were needed, made provision for roads and bridges, for schools, and for the care of the poor. The town was the local unit for the organization of the colonial militia and also for election of representatives in the colonial assembly. Its organization and functions were thus not unlike those of the parish meeting in England.

In the earliest colonial days the town meeting was called at frequent intervals, but as the towns grew in size this was found to be inconvenient. Consequently the townsmen adopted the plan of appointing, at the annual town meeting, a board of selectmen or executive committee whose function it was to carry out the decisions of the town meeting in the intervals between sessions. The board consisted of never less than three nor more than thirteen townsmen, elected for a single year, and unpaid. Their duties, at first very loosely defined, became in time more clearly marked out. They took immediate charge of such administrative work as there was to do. The town had some other officials,—also, such as assessors, surveyors of roads, and constables, all elected in town meeting. This town form of local government predominated in all the New England colonies.

In the southern colonies a different type prevailed. There the

Types of local government in the American colonies :

1. New England.

Why the town type was evolved.

The town meeting.

The officers of town government.

2. The southern colonies.

The county type.

county became the chief unit of local administration. Its officers, including a county lieutenant, a sheriff, and several justices of the peace, were appointed by the governor, there was no general meeting of all the citizens to vote the taxes or to determine matters of local policy. The voters of the county, that is to say, those citizens who held property or were otherwise qualified to vote, elected the county's representatives in the colonial assembly. It was just as logical, however, that the county type of local government should prevail in the South as that the town type should predominate in New England. In the southern colonies there were large plantations with relatively few people on them. The homes of the planters were scattered at distances one from another, and there was no social or religious solidarity as in New England. Almost everywhere throughout the colonial South the management of local affairs drifted into the hands of the plantation-owners, who formed a close corporation. The chief organ of county government was the county court, which, as in England, combined administrative with judicial functions. For example, it had charge of the building and repair of roads and bridges. This county court was made up of justices of the peace, and its sessions were held four times a year.

3. The middle colonies.  
The mixed type.

In the middle colonies, particularly in New York and Pennsylvania, there was a mixed type of local government, in other words, a combination of county and town administration. After the evacuation of the New Netherland by the Dutch the English divided the colony into counties each with a county court. The county did not, however, become as strong as in the southern colonies, and the administrative functions of the county courts were in time taken over, for the most part, by the elective county supervisors. Towns and townships were also established in the middle colonies, especially in New York, and they became important areas of local government although by no means so dominating as in New England.

The colonial borough.

Another unit of local government in nearly all the colonies except those of New England was the borough. In England a borough was a town which had received a charter from the crown; in America it was a place chartered by the governor as the crown's representative. Various colonial towns received such charters and thereby became boroughs, among them New York, Albany, Philadelphia, Annapolis, Richmond, and Trenton.

There were about twenty boroughs in all. None of them were in the New England colonies, for there the system of town government was regarded as sufficient and satisfactory even for the largest colonial communities such as Boston, Salem, and New Haven.<sup>1</sup> When a town became a borough, it received a new scheme of administration, modelled upon the prevailing system of borough government in England. Thenceforth it had its mayor, aldermen, and common councillors. The mayor was in some cases appointed by the governor; more often he was elected by the aldermen and councillors together. The voters or free-men of the borough chose the councillors, and the latter, in turn, named the aldermen; but all sat in the same borough council,—mayor, aldermen, and councillors together. This borough system, as will be shown later, was the genesis of the American plan of city government.

The system of local government before the Revolution, despite its considerable variations in different parts of the land, was regarded by the colonists as satisfactory. It was especially so in New England, and in the other areas no serious outcry was ever raised against it. Oppression in local government was not one of the causes of the Revolution. The colonists everywhere had as much control over their local affairs as had Englishmen at home; in some cases they had a great deal more. A large part of the local organization which existed in colonial days survived the Revolution, and some of it has remained to this day. The New England system of town government, for example, has come into the twentieth century without substantial change.

Satisfactory nature of local government in the colonial era.

The Revolution did not, therefore, bring about any general reconstruction of local government. New England retained its town organization intact; Virginia kept the county system without any change whatsoever. In the other states there were some alterations, chiefly in the way of making the county officials elective. But direct election by the people did not at once find favor in all the states and even where it was adopted the suffrage remained largely confined to the freeholders or taxpayers. Revolutions usually do very little upsetting to local institutions and the American Revolution was no exception.

General effect of the Revolution upon local institutions.

<sup>1</sup>Two borough charters were granted in New England, but no borough governments were actually established.

Development of local institutions during the period from the Revolution to 1820.

Far more important than the Revolution, in the history of American local government, was the opening of the West. In the closing years of the eighteenth century and during the first decade of the nineteenth, the great western regions began to be settled and organized. To these territories the local institutions of the older states were transplanted. But in moving westward, as Professor Fairlie has pointed out, they roughly followed the parallels of latitude.<sup>1</sup> In other words, the new states of Kentucky and Tennessee took their local institutions from Virginia and the other states of the older South, while Indiana and Ohio adopted systems of local government similar in main outlines to that of Pennsylvania. Mississippi and Alabama were influenced by Georgia. In the Northwest Territory the influence of New England was discernible in the establishment of town meetings, although these meetings developed no important function except that of electing the local officials.

Influence of the frontier states.

But although the new states derived their outlines of local government from the older ones they developed them more rapidly along democratic lines. Again the frontier influence made itself felt. The principle of popular election received new emphasis. So the original diversity of local government was not only maintained but intensified. By 1820 there were not only three general types of local government in the various states, but at least a dozen modifications of these three types and they represented every conceivable degree of democracy in local institutions.

Developments between 1820 and the Civil War.

It was about this time, 1820, that the movement towards the direct popular election of all local officials began to gain an irresistible momentum. During the next twenty years the elective plan made great headway, not only in the frontier states but in New England, New York, and Pennsylvania. The democratic wave which marked the Jacksonian era swept the elective principle into acceptance almost everywhere, while the widening of the suffrage placed the control of local elections in the hands of the whole people and not of the taxpayers alone.

Fairlie's summary of the situation in 1860.

Thus by the time the Civil War began, the main features of present-day local government throughout the United States had become well established. Throughout the country, as Professor

<sup>1</sup> *Local Government in Counties, Towns and Villages* (New York, 1906), p. 35.



Fairlie has shown, the states were divided into counties, each with a considerable number of elective offices, but with important differences in the organization of the fiscal authority. Everywhere, too, the county was subdivided into smaller districts; but these varied in importance from the New England town, through the township of the Middle West, to the election and judicial precincts in the South. The basis of suffrage for local elections was the same as for state elections, and had been steadily expanding during the half-century before 1860, until the general system was one where every free white male citizen could vote.

During the fifty years or more which have elapsed since the conclusion of the Civil War there have been many changes in the government of cities, counties, towns, townships, and villages throughout the country, and some of them are of great importance. The United States, during the past fifty years or more, has been the world's busiest laboratory of experimentation in local government. Cities have tried and are trying five or six different types of political organization, the more significant of which will be explained in later chapters. County government has assumed a variety of forms, and new plans are still being devised. Even in New England the government of towns is no longer uniform, for some of them have abandoned the old type of town meeting. Most countries have a "system" of local government; America has none. What the student finds in the United States is a chaos of local areas—counties, cities, boroughs, towns, townships, villages, parishes, school districts, road districts, sanitary districts, irrigation districts, and incorporated districts of a dozen other varieties. There are at least twenty thousand of these local divisions in the whole expanse of the country, and while it would be far from accurate to assert that no two of them are governed alike, it is well within the truth to say that there are more varieties of local government in the United States than in all the other countries of the world put together.

When you study the government of one English county, you know how all the others are governed. When you have mastered the government of one French commune, you know all that is worth knowing about the thirty-six thousand others. But when you have learned how one American city is governed you have acquired no inkling as to the frame of organization in other

Changes  
in local  
govern-  
ment since  
the Civil  
War.

The  
present  
chaos.

Contrasted  
with  
conditions  
abroad.

cities, even other cities in the same state. Cleveland and Columbus, for example, are not far apart geographically; but their respective municipal governments are as differently constituted as any two governments could possibly be. This appalling diversity in the types of local government is something that foreign students of American government cannot understand. They are also dismayed by the looseness of our terminology. Such terms as city and town mean entirely different things in various parts of the country. Many New England towns are rural communities with relatively few inhabitants spread over a considerable area. In the states of the Mississippi Valley they would be called townships. A village in New York would be called a city in California, a borough in Pennsylvania. The distinction between city, town, borough and village is not one of size, population, or importance, but of legal status or local usage.

Three outstanding developments in American local government, taking these various divisions as a whole, may be noted during the past half century. The first is the practice of "incorporating" tracts of territory for special purposes. Ordinarily the first step in local government has been the organization of a county or township. Then, when a portion of the county or township becomes thickly settled, the usual practice has been to incorporate this portion as a village, borough, or city. It then may or may not become detached, or semi-detached, from the larger area for governmental purposes. In many cases the inhabitants do not desire separation from the county or township; nor do they desire incorporation as a village or city; all they ask for is some special facility in the way of police or fire protection, schools, sanitation, or water supply. To meet this situation there has been devised the plan of creating police districts, school districts, sanitary districts and so on. These districts, established by law, are incorporated municipalities; they elect their own trustees who have power to tax and to borrow money, but their borrowing power is usually made subject to approval by vote of the people in the district. The districts exist for a specific purpose and have no relation to other governmental activities. Hence a man may live in a county, a township, a high school district, a grade-school district, a sanitary district, and so on, the boundaries being different in each case and the authorities of each levying taxes upon him. This overlapping of municipal corporations, each

Recent  
develop-  
ments in  
local gov-  
ernment :

1. The  
special  
districts.

with power to tax and to borrow, is leading local government into extreme confusion.

A second feature is the growth of stricter state control over local government. Home rule for cities and for counties has been vigorously demanded in various parts of the country, and in some cases it has been granted. But the grant of freedom from state control is sometimes little more than a gesture. It is impossible to let every city and county be a law unto itself. Their problems are so closely related and interwoven that a state must of necessity exercise some supervisory control over them all. Will anyone argue, for example, that each county or city should be permitted to tax what it pleases and as it pleases? To borrow money without any limit being fixed by the state? To neglect public health measures if it chooses? To provide schools or not at its own discretion? Of course no one would press the principle of local self-government to that extreme. The guiding and restraining hand of the state must be kept in action; the only question is how far it should go. But as the country becomes more thickly settled, as local problems become less local and more general, as things have to be done on a larger scale—as this development proceeds it will become necessary for the state to intervene more and more. It is already doing a great deal of supervision.

Yet with all this widening of central supervision over local government, the counties, towns, and townships of the United States have on the whole a larger measure of autonomy than their prototypes in European countries. In the French Republic everything is supervised from Paris; there is very little local self-government worthy of the name. In England, which is the original home of local self-government, centralization has made astonishing headway during the past half century. The movement for strengthening central control over the local authorities is not confined to any one country; it is world-wide. Where it will stop, if it ever does, is difficult to predict.

Finally, there has been developing, in American local government, during recent years, a noticeable emphasis upon "efficiency" as it is rather infelicitously called. The inclination is to look upon the work of the city, county, town or township, as *business not government*. As a result there has been a marked improvement in the methods whereby the work of local adminis-

2. The growth of state control.

Even yet, however, there is more local self-government in the United States than in European countries.

3. The emphasis on efficiency.

tration is being carried on, particularly in the financial methods. This movement has affected the cities more particularly, but it is making progress in the areas of local government as well.<sup>1</sup>

<sup>1</sup>The evolution of local government is dealt with at length in G. E. Howard's *Local Constitutional History of the United States*, a work which still retains much value despite the fact that it was published many years ago. The later development of local institutions is explained in H. G. James, *Local Government in the United States* (New York, 1921).



## CHAPTER XXXVIII

### THE AMERICAN CITY

To make the city is what we are here for. He who makes the city makes the world. For whether our national life be great or mean depends on the city.—*Henry Drummond.*

The development of large urban communities, or cities, has been the most striking social phenomenon of the past ten decades.<sup>1</sup> England, a hundred years ago, was the only country in which the inhabitants of cities formed any considerable fraction of the national population, and even there it was less than forty per cent. The United States, in 1820, contained only about a dozen places with populations exceeding eight thousand, and taking these as a whole they contained less than five per cent of the country's total. In 1920, just a century later, the total number of such communities ran above nine hundred, and together they contained nearly forty-five per cent of the American people. The movement of the people from country to town has assumed huge proportions, especially in recent years, and it shows no signs of abating.

A century  
of city  
growth.

Various factors have contributed to this extraordinary development. Improvements in agriculture, for one thing, have released men from the soil, permitting great increases in the production of foodstuffs without a corresponding increase in the amount of labor required. This has permitted and even encouraged the exodus of young men and women from the rural areas. Industrial causes, too, have been of great importance: particularly the extension of the factory system with its never satiated demand for labor in the cities and towns. "God made the country, and man made the town," Cowper tells us, and that is true in a very literal sense; for man devised the means of

Reasons  
for the  
rapid  
growth of  
American  
cities.

<sup>1</sup> A much more extensive discussion of city growth, in all its phases, may be found in the author's *Municipal Government and Administration* (2 vols., New York, 1923), especially Vol. I, Chaps. i-v.

utilizing steam power, and steam power has revolutionized the order of human life in civilized lands.

Factories congregate in cities, mainly in large cities, and where the factories are there will the laborers be gathered together. Commerce also has had its place as a contributing cause of city growth. Nearly all the great centers of population in both the Old World and the New are situated on navigable waters. It is hardly a mere accident that the American cities of two hundred thousand people or more which are not situated upon navigable waters can be counted on the fingers of one hand. Railroad transportation, furthermore, has helped to build up the large communities, making it easy to get raw materials and to market the products of manufacture. The flood of alien immigration during the fifty years between the close of the Civil War and the opening of the great European conflict directed itself chiefly to the cities for various reasons. And these are only the outstanding causes. Political factors, such as the choice of a place as the state capital or county seat, have contributed to the upbuilding of some cities; educational advantages have helped as many more. Improvements in sanitation, in housing methods, and in public recreation have made the city a better place for men to live in. Its call has become irresistible.

There are more cities in the United States than in any other country. Among the dozen largest cities of the world, five at least are American. At the present time there are twelve American cities with populations exceeding half a million and twenty-five with populations above a quarter of a million. More than a hundred cities in the United States have over 75,000 people. The nation is becoming industrialized at a rapid rate, so much so that the United States can no longer be called a rural or agricultural land.

This is a fact of great social significance, for the influence of cities upon the national life is much greater than their numerical strength in the census figures would imply. It is the cities that supply the leaders in all branches of activity: political, social, and economic. Through their newspapers, through the various organizations which center there, and through their leadership in every form of propaganda it is the cities that mold the public opinion of the nation to a large degree. No country can change from a rural to an urban land without some transformation in its

Effects  
of urban  
expansion.

political temperament, its social complexity, and in the nature of its economic problems.

Many things differentiate the city from the rural area. The occupations of its people are highly diversified, so that no bond of common vocation and economic interest holds them together as is the case with agricultural communities. Division of labor in industry and commerce is carried to its zenith in the large cities and extreme specialization usually narrows the horizons of men. It develops a personal expertness in doing some one thing, with a dependence upon others for everything else. The city-dweller looks for professional guidance in philanthropy, in recreation, even in politics. The whole tendency of city life is towards docility and the extinction of independence in thought and action. Men who are born and grow up in large communities do not realize the workings of this psychological influence, but its pressure is incessant.

The city  
as a social  
unit.

Traits  
of its  
population.

The  
attitude  
of docility.

Paradoxical though it may seem, the city nevertheless tends to be restless in its attitude toward political and economic issues. Its restive frame of mind does not betray, however, the radicalism of independence but of self-interest. This is because the city is the habitat of great propertyless elements and lacks the stabilizing influence of widely distributed private ownership. In Boston not one in five families own their homes; in New York not one in eight. In the rural districts of the United States, on the other hand, nearly half the adult male population can claim the ownership of land. The great disparity in income and wealth which may be found within the bounds of the city is also an incentive to restiveness on the part of the less well-to-do. Class antagonisms develop, therefore, more readily in cities than in regions where worldly possessions are more evenly distributed, and where each man's earnings do not differ greatly from those of his neighbor.

Radicalism  
in cities :  
its causes.

The presence of large foreign-born elements in American cities is another factor which has tended to promote political docility, social unrest, and a readiness to depart from established traditions in government or law. In the nation as a whole only thirteen per cent of the population is of foreign birth; but in the cities the ratio is much higher. Rarely is it less than twenty-five per cent and it sometimes exceeds fifty. Many of the largest cities are veritable melting-pots for the assimilation of aliens

The alien  
element in  
American  
cities.

drawn from the ends of the earth. It is said of New York City, and doubtless with truth, that it contains "more Irishmen than Dublin, more Italians than Padua, more Greeks than Sparta, and more Jews than Jerusalem." The immigrant brings with him no knowledge of American political traditions. His eyes are on the future, not on the past. If he tries to enter into the spirit of American institutions, he finds great obstacles in the way, his lack of education, his difficulties with the new language, his racial consciousness, and the various other factors which throw him into the company of other immigrants like himself. All too soon he learns to think as they do, to be exploited by politicians, and to shape his attitude upon political questions in accordance with the only sources of information which are open to him.

Why immigrants concentrate in urban centers.

Why have the immigrants concentrated in the cities, particularly in the large cities? It is not merely because they land there, for Chicago and St. Louis, Bridgeport and Gary, Milwaukee and Schenectady, all have large infusions of foreign-born although they are not ports of entry. The real reasons are partly social and partly economic. The immigrant goes where he can be with others of his own race and tongue, hence whenever a colony of Italians, Greeks, Poles, Lithuanians, Armenians, or any other alien element gets a foothold in an American community, it is sure to be steadily augmented by new arrivals. But the economic magnetism of the city is even stronger. The great majority of immigrants have come to America to work, and it is in the city that jobs can be most readily found. The factories and shops of the large industrial centers have afforded an almost unlimited demand for alien labor. The largest single industry in New York City, for example, is the manufacture of "ready-to-wear" clothing, and this industry employs foreign-born labor almost entirely. Some immigrants, it is true, have gone to the agricultural, mining, and lumber regions of the country; but the industrial cities have always obtained the lion's share of the influx. It is upon the cities, therefore, that the burden of Americanizing the alien has been chiefly placed, and a heavy burden it is. At times it has looked as though the outcome might be the un-Americanizing of the city.

Other urban traits.

In many other respects a city differs from a rural unit of equal population. It has a higher birth-rate, a higher death-rate, and a far higher ratio in the statistics of crime. It has rela-



tively fewer illiterates, strange to say, despite its larger proportion of aliens. This is a tribute to the educational advantages which the cities provide in the way of evening schools and similar institutions. The people of the city earn more per capita, spend more, and save more than those of rural sections. They preserve, as military statistics have shown, a substantial equality with the rural population in point of good physique and the absence of serious bodily defects. Other differences which cannot be statistically compared there must be in plenty. They are plain enough to any observant eye. The city populations are more volatile, less dependent upon the associations of home and church, more influenced by things of the moment and less by tradition, more ardent in their championship of new doctrines, and have more initiative. The city, however, is a place where extremes meet. Wealth and poverty, culture and ignorance, virtue and vice, are there brought into close proximity. The city of to-day is responsible for most of what is good, and for most of what is bad, in our national life and ideals.

The genesis of city government in the United States may be found in the chartered boroughs of the colonial period. New York, in 1686, was the first American community to receive a borough charter, but Albany became similarly incorporated a few months later. In due course nearly a score of other places got their charters as boroughs. These borough charters were in all cases granted by the colonial governor, and in a general way they were modelled upon those of English municipal corporations at the time.

The government of the colonial city or borough was in the hands of a borough council, made up of a mayor, aldermen, and councillors, all sitting together. In most cases the councillors were chosen by the people, and so were the aldermen; but the mayor was usually appointed by the governor of the colony. Very little was provided for the citizens in the way of municipal services. Paved streets and sidewalks were rare; there was no public water supply or sanitation, no public lighting to speak of, no professional police or fire protection service, and no arrangements for public recreation. Poor relief to some extent, public schools in some boroughs, the administration of local justice and the making of some by-laws constituted the main functions of borough government in colonial times.

Periods in American municipal development :

1. The colonial era.

Borough organization in the colonies

2. From  
the Rev-  
olution  
to about  
1820.

The Revolution made some changes both in the form and spirit of these municipal institutions, although the general structure continued for the most part unaltered. Charters were henceforth granted by the state legislature. The disposition in colonial times had been to treat the boroughs as close corporations after the prevailing tendency in the mother country. After the Revolution this idea was abandoned; the suffrage was slowly widened, and the local officers were made more directly accountable to the whole body of the citizens. The framing of the national constitution in 1787 also had an influence upon the cities. In many of the new city charters there was a conscious imitation of the federal system with its arrangement of checks and balances. The city council during the early years of the nineteenth century became a double chamber, with its two branches known usually as the board of aldermen and the common council. The practice of choosing the mayor by popular vote also came into existence and in time supplanted the method of appointment by either the governor or the city council. In general the system of city government became a reproduction in miniature of the national and state organizations. The principle of division of powers thus gained a general acceptance in all three fields of American government.

3. From  
1820 to  
the Civil  
War.

From about 1820 to the Civil War municipal growth went forward at an increased pace, and new problems came to the front. The system of administration by committees of the council proved unsatisfactory in the larger communities, for it resulted in mismanagement and waste. Hence arose the policy of giving the management of public works, water supply, and similar departments to boards of officials specially chosen for the purpose and wholly independent of the council. Likewise, as a further check upon the council's activities, the mayor was given the power of veto, and occasionally was empowered to appoint the various administrative boards and officials. In a word, the council began to lose its hold upon administrative affairs, and the development of a strong municipal executive commenced. This shifting of power was hastened to some extent by the decline in the quality of municipal councils which has usually been attributed to the influx of aliens during the mid-century period, but which really began before the tide of immigration set in. The spoils system of the Jacksonian era, which found its way

into municipal government, did much to demoralize the city councils by placing large amounts of patronage in the hands of small politicians.

State interference in municipal affairs, as a result of waste and extravagance, became more frequent. The lax enforcement of state laws, in the larger centers of population, the freedom with which cities were spending and borrowing money, the inefficiency which characterized the administration of various departments, all combined to encourage state investigation of local affairs and state intervention. The cities began to lose what modicum of home rule they had. State laws stepped in to circumscribe the powers of city councils and city officials, taking away some of their discretion and increasing their legal responsibility. In a few cases, where municipal misgovernment had become intolerable, the state legislature took matters out of the city's hands altogether. In New York City, for instance, the state took over the city's police administration in 1857 and did not give it back until 1870. State interference in municipal affairs did not have its origin in any theory of government but in the sordid facts of local misrule. The cities themselves, in most cases, invoked it by their perversions of democracy and their gross abuse of local independence. Once this habit of state intervention began it was hard to check, and in time it became an abuse as serious as that which it originally set out to cure.

The third period in American municipal history extended from the close of the Civil War to the end of the nineteenth century. It began rather inauspiciously because the tide of immigration which had ceased to flow during the war years now set in again with redoubled force and the cities grew more rapidly than ever before. Industry and commerce expanded, and optimism was the keynote everywhere. The cities spent money with a free hand, discounting the future as optimists are wont to do. Taxes soared, debts ran into the millions. Much of this money was spent without proper planning, much of it went to contractors who scamped their work, and not a little went directly into the pockets of local politicians. These were the days of the Tweed Ring in New York, the Gas Ring in Philadelphia, and of less notorious plunderbunds in other cities. The spoils system, during the seventies and early eighties, ruled without hindrance. It flaunted its doctrines all over the land, and helped to make the city, in

The growth of state interference in city affairs.

4. From the Civil War to about 1900.

the words of Lord Bryce, "the one conspicuous failure of American government."

The failure  
of reform  
movements  
in this  
period.

During these years there were spasms of reform. One of them ousted the Tweed Ring in New York and secured the insertion of new safeguards in the city charter. In other cities these reform movements succeeded in transferring more power to the mayor and in making him somewhat more directly responsible for the administrative functions of city government. Civil service reform, moreover, having gained large recognition in national administration during Grover Cleveland's first term as President, presently began to make its influence felt in the cities as well. But in no city of the country was there any successful reconstruction of the entire system of municipal organization. It was taken for granted that the trouble did not lie with the machinery of city government but with the men who were running it. Reform campaigns, accordingly, were undertaken chiefly for the purpose of replacing one set of officials with another. But when they succeeded (as they did occasionally), little of permanent value was achieved. A few new provisions went into the city charter; the tax rate was lowered a notch or two; some spoilsmen were pried loose from the city payroll, and then the reform administration would go out of office with excuses for not having accomplished more.

5. The  
period  
since  
1900.

Municipal reform did not make much real progress in the United States until the opening years of the twentieth century. About that time it entered a new era by directing its assaults not merely against incompetent or corrupt office-holders, but against the system which permitted and even encouraged dishonest men to gain control of the city's affairs. Public opinion at last began to realize that efficient municipal administration is not merely a matter of men, but of laws and institutions as well. Beginning with the Galveston experiment of 1901 the country has witnessed the reorganization of city government on a scale which would have been considered impossible a generation ago. The doctrine of checks and balances has been abandoned by several hundred cities; the mechanism of city government has been simplified by the elimination of needless officials and boards; the commission and city-manager plans, home-rule charters, the initiative, referendum, and recall, the short ballot, stringent laws against corrupt practices, the direct primary and nom-



ination by petition, the abolition of party designations,—these and many other changes have made the American municipal system a very different thing from what it was in the years preceding 1900.

So much for an outline of the stages through which our present system of city government has developed. Now let us look at the basis of our municipal organization to-day. This basis of city government is a document known as the city charter. The charter is, in a sense, the constitution of the city. It provides what officials the city shall have, how they shall be chosen, what functions they shall perform, and what powers they may exercise. All city charters emanate from the state legislature, but the legislature may be restricted by the provisions of the state constitution as to the manner in which such charters shall be granted. Different states pursue various methods; there are five principal methods of framing and granting a city charter. These may be designated as the special, general, classified, home-rule, and optional charter systems.

The basis of city government—the city charter.

Methods of granting charters.

Of these the special charter system is the oldest. Under this plan every city is dealt with as a separate problem and gets whatever form of charter the legislature chooses to give it. All may get the same charter, or each may get a different one, the latter being the usual course. On its face, this system has much in its favor and several states still use it. It has the virtue of flexibility, enabling the legislature to frame each city's charter with an eye to particular needs, giving it such officials as may be required, and such powers as seem necessary. But in practice the special charter system throws the door wide open to partisan discrimination and to continual state interference in matters of purely local concern. To help the dominant political party, or to serve some other selfish interest, legislatures have frequently altered city charters against the will of the citizens, treating these documents as though they were entitled to no more permanence than any ordinary law. Where there is no barrier to the granting of special charters the legislatures have not hesitated to interfere with the conduct of routine business in cities, raising the salaries of favored officials, reinstating dismissed municipal officers, altering the boundaries of wards, awarding holidays to municipal employees, and so forth,—all such actions being dictated by purely political motives.

1. The special charter system.

Its merits and defects.

## 2. The general charter system.

Popular resentment against this interference brought about a reaction. In many of the states this resulted in constitutional amendments which forbade the legislature to pass special acts relating to the government of individual cities and required that all cities be dealt with by general laws. The understanding was that the state legislature would enact a state-wide municipal code which would serve as a uniform charter for all the cities within the state. Then, if the legislature desired to change the government of one city it would have to amend the code, thereby changing the government of them all.

## Its merits.

This plan has the merit of simplicity and uniformity. It treats all cities alike. But the trouble is that all cities are not alike; they are very different in their needs and problems. There is no similarity between Cleveland and Ashtabula although both are in the same state—or between Chicago and Urbana, or between Boston and Newburyport. Being different it is impossible (even by a constitutional provision) to make a legislature treat them uniformly. So the general charter system did not accomplish much. Legislatures found ways of evading the constitutional requirement. They passed laws which were general in form, which in semblance were amendments to the state-wide municipal code, but which in reality applied to a single city. They made their amendments run in some such form as this, for example: "Any city in the state which has a population of not less than 100,000, which is a county seat and is situated on a navigable river, etc." The language is general enough, but only one city would be affected.

## Its defects.

The great defect of the general charter system is its rigidity. Not all cities are alike in size, population, characteristics, problems, or requirements. A seaport city, for instance, may need a harbor board with power to regulate the anchoring-places of ships; but to require for the sake of general uniformity that inland cities of the state shall also have harbor authorities and anchorage regulations is a palpable absurdity. It is possible to make the provisions of a general code somewhat elastic, as has been done in Illinois, but even this does not seem to make the plan satisfactory. So it is being abandoned.

## 3. The classified charter plan.

Some states have attempted a compromise between the special and general charter systems by providing that the cities shall be grouped into classes according to their respective populations

and that the legislature shall grant similar charters to all cities within the same class. This allows more leeway, while at the same time preventing any discrimination in favor of, or against, a particular city. Grouping cities according to their population, however, is at best a purely artificial method of classification, for municipalities which stand close together in the census figures may be wholly unlike in the nature of their populations, in their resources, their problems, and their administrative requirements. As cities grow, moreover, they pass from one class to another, thus coming under a new charter régime whether they desire to change the existing system or not. After the census of 1920, for example, the city of Reading (Pennsylvania) found itself transferred from the third to the second class and had to give up its commission form of government.

Like most compromises, therefore, the classified charter plan has not solved the main problem. Some states have tried somewhat kindred devices for preventing special laws relating to city charters. In New York, for example, if the legislature passes a special law for any individual city this law does not go into effect until after it has been submitted to the authorities of the cities concerned. If the latter disapprove it, the law must be repassed by the legislature at the same session and approved by the governor before it becomes effective. In other words, each city has a suspensory veto over all special legislation relating to it.

The fourth method is known as the home rule charter system. By constitutional provision or by statute it is now established in eighteen states.<sup>1</sup> As its name implies, it is a plan whereby cities make their own charters just as states make their own constitutions. And those which do not see fit to frame their own charters remain under the provisions of the general or special laws as before.

The methods of framing home rule charters differ somewhat in the various states, but usually the drafting of the document is intrusted to a body of citizens commonly known as a board of freeholders or charter commission. The members of this board are usually elected, but in Minnesota they are appointed by the

4. The home rule charter system.

Methods of framing them.

<sup>1</sup>These states are Missouri, California, Washington, Minnesota, Colorado, Oregon, Oklahoma, Michigan, Arizona, Nebraska, Ohio, Texas, Connecticut, Florida, Maryland, Indiana, New York, and Pennsylvania.

district court. The freeholders receive suggestions from the citizens; they study the charters of other cities and usually spend several months in drafting the document. When the board has completed its work, the charter is submitted to the people of the city and if it is approved by them at the polls, it goes into effect without further approval.<sup>1</sup> Individual amendments to home rule charters are ordinarily initiated by petition and adopted by the voters. In a word the home rule system professes to give the people of the city the right of self-determination.

Limitations of the home rule system.

In actual practice, however, it does not grant as much local freedom as this brief description of it might indicate. The cities, in making their own charters, are given a free hand in all matters of purely local concern. But what are matters of local concern? The line of demarcation between matters of local interest on the one hand and of state interest on the other is not firmly fixed; but the sphere of the state is ever widening, and it already includes a host of things such as assessment, taxation, elections, police, licenses, education, public health, poor relief, which on their face might be deemed to be matters of municipal jurisdiction. The provisions of home rule charters must keep within the bounds of the general state laws on these and many other matters. Municipal home rule does not mean, therefore, that each city can set up a little rock-ribbed republic, but merely that it may choose for itself the general outlines of its own government and that it shall be free from state interference within that rather limited realm which is usually designated as the field of "strictly municipal affairs."

Its merits.

But notwithstanding these limitations the home rule charter system has some tangible advantages. It relieves the legislature from having to do with a multitude of local matters at every session, thus affording more opportunity for the due consideration of state-wide problems. Under the special charter system it has been found that municipal affairs frequently consume from one-fourth to one-third of a legislature's time. The home rule system helps to divorce state from municipal politics, and it has also proved an agency of political education, encouraging the voters

<sup>1</sup> In Arizona and Oklahoma, however, it goes first to the governor, who may withhold his signature if he finds the charter in conflict with the state constitution or laws. In California it goes to the legislature, which may accept or reject, but may not alter it.



of the city to take an active interest in the form and functions of their local government. When things go wrong they cannot blame the state legislature, as they always do when there is interference from outside. But its greatest advantage lies in the fact that under the home rule plan a city gets a frame of government which suits its own special needs. It obtains the sort of charter its people desire, provided, of course, that their desires do not run counter to the general interest of the state as a whole. Something may also be said for the home rule system as a promoter of new experiments in city government, and it is only through the trying of experiments that we can make progress.

The fifth method of granting city charters is known as the optional charter system. It is a compromise between the general charter plan at the one extreme, and municipal home rule at the other.<sup>1</sup> Under this arrangement the state legislature provides several standard charters, any one of which a city may adopt by popular vote. The optional charter law passed by the New York legislature in 1913 provided seven different forms of local government and allowed any city of the state except the three largest (New York, Buffalo, and Rochester) to choose whichever one of these plans it might desire. The Massachusetts optional charter law of 1915 provides four options, namely, city government by a mayor and small council, by a mayor and a large council, by a commission, and by a city manager. Optional charter laws have also been enacted in North Carolina, Virginia, and some other states. The merit of this plan is that it gives flexibility to the charter system, allowing each city a reasonable range of choice, without opening the door to such radical innovations as the home rule plan has sometimes encouraged. Home rule charters usually bring a flood of lawsuits, but the optional charters are carefully fitted to the general state laws so that there can be no conflict. This system, on the whole, seems to have the largest number of real advantages without countervailing drawbacks. It does not give the city complete freedom, to be sure, and no charter system ever can do so. The cities are integral parts of the state and sometimes include the major part of the state's population. To urge that they should be "free from

5. The optional charter system.

New York.

Massachusetts.

<sup>1</sup> Someone has facetiously remarked that the general charter plan is *table d'hôte*, the home rule plan is *cafeteria service*, and the optional charter plan is *service à la carte*.

all legislative interference" is to propose an absurdity. The state must control what goes on within its own borders.

What a  
charter  
contains.

What does a city charter contain? It begins, as a rule, with a statement of the city's boundaries and then declares the city to be a municipal corporation, with corporate powers—the right to sue and be sued, to own property, to make contracts, and so on. Next it provides what officers the city shall have, how they shall be chosen and for how long, how they may be removed, and (sometimes) what salaries they shall be paid. It sets forth, also, the powers and duties of the various officials. Finally, there are many miscellaneous provisions relating to such matters as awarding contracts, budget-making, auditing accounts, and purchasing supplies. Some charters have long provisions relating to the initiative, referendum and recall; a few provide for proportional representation. A charter may contain only general provisions or it may include a large mass of detail.

The tendency is to make charters needlessly long. The present charter of New York City forms a ponderous volume of 1478 pages. That is a far call from the charter which William the Conqueror gave to London eight centuries ago—a charter which contained only seventy-eight words!

## CHAPTER XXXIX

### MUNICIPAL ORGANIZATION: THE MAYOR-AND-COUNCIL PLAN

For forms of government let fools contest,  
That which is best administered is best.

—*Alexander Pope.*

The city charter, as has been said, prescribes the frame of municipal government. And during the nineteenth century the city charters established a form of government which did not differ very much from state to state. There were many differences, to be sure, but nowhere was there any radical departure from the mayor-and-council plan which had been borrowed from England. Every American city, at the end of the nineteenth century had a mayor who was elected by the people and who served as the chief executive of the municipality. Every city had a council, consisting sometimes of two branches but more often of a single branch only. And this council was designated as the legislative organ. In addition there were numerous administrative officials and boards, chosen in various ways and performing a variety of functions. This plan of city government, based upon the principle of checks and balances, was universal in the United States until the beginning of the twentieth century. The mayor and the council were a counterpoise to each other.

The old  
municipal  
system.

Then came the introduction and spread of a new plan, radically different in form and principle—the commission plan. This new scheme of city government originated in Galveston (1901) and its most notable feature was the complete abandonment of the old principle of checks and balances. It vested all governmental authority in the hands of a commission made up of five members elected by the voters of the city. The commission was to be the chief executive and legislative organ combined. This scheme of government obtained an immediate popularity because it was so simple, and it spread widely within a few years.

The new  
experi-  
ments.

1. Com-  
mission  
plan

But the commission plan showed itself defective in some points. For one thing it did not sufficiently concentrate the executive power. It provided a five-headed executive whereas all political experience demonstrates the need for putting the ultimate executive responsibility in the hands of a single man. Plural executives have never functioned well anywhere. So the municipal reformers devised an improvement in the commission plan which became known as the commission-manager form of government, or, more commonly, as the city-manager plan.

Under the city manager plan all such corporate powers and functions of the municipality as have to do with the determination of policy and the general direction of local affairs are intrusted to a small council or commission elected by the voters, while the strictly administrative functions of municipal government are placed in the hands of a professional, well-paid officer, known as the city-manager, who is chosen by the council for his proficiency as a municipal administrator. In other words the affairs of the city are assumed to be managed in much the same way as are those of a business corporation. The stockholders (i.e. the voters) elect a board of directors; the directors appoint a general manager. He, in turn, chooses his own subordinates. The directors determine the general policy of the corporation and the manager carries the policy into effect. This plan originated in Dayton, Ohio (1912) and has since been adopted by a large number of cities.

These are the three types of city government now being operated in the United States. The mayor-and-council plan is still the one most widely used in the larger municipalities. There are twelve American cities with populations exceeding 500,000; the mayor-and-council form of government is retained in ten of them; while the commission plan has been adopted in one (Buffalo) and the city manager plan by one (Cleveland). In the cities of the next range, those having populations between 200,000 and 500,000, the mayor and council plan is also the one most widely used; but in the smaller municipalities (especially those having less than 50,000 inhabitants) the commission and city manager forms of government have been extensively adopted. The merits and defects of these various plans have been earnestly discussed and the argumentation is not yet at an end.

2. City  
manager  
plan.

Present  
status of  
these  
three  
plans.



Mayor-and-council government is based, as has been said, on the principle of checks and balances. A mayor directly elected by the people, and a body of department heads (usually appointed by him) perform the executive or administrative functions of city government. They are independent of the city council to the same extent that the President is independent of Congress. The council, also elected by the voters, is endowed with legislative, or "policy-determining" authority. The whole arrangement, in a word, is a small-scale reproduction of the federal government with variations to suit local conditions.

Basis  
of the  
mayor-  
and-  
council  
plan.

The mayor, in cities having this form of government, is everywhere chosen by direct popular vote. Nominations, as a rule, are made at a primary, and the election is by secret ballot, usually with party designations thereon. To be eligible for election a candidate must in all cases be a qualified voter, and in some cases additional residence requirements are imposed. It is not necessary that a candidate for the mayoralty shall have previously held any other office or have had any experience in municipal government, but in practice the candidates are almost invariably men who have been prominent in national, state or local politics. The mayor's term is either two or four years in most cities, the former being customary in nearly all but the largest ones. Usually a mayor may be chosen for a second term; but in a few cities, including Philadelphia and Boston, this is not permitted. The office carries a salary which varies from a few hundred dollars in some of the smallest cities to fifteen thousand in New York.

The  
mayor.

The authority of the mayor usually includes the right to advise the city council by message or communication, to veto ordinances (municipal laws), to appoint most of the higher city officials, to exercise various powers in relation to municipal finance, and to perform some miscellaneous functions.

His  
powers.

According to the theory of the mayor-and-council plan the mayor has no share in legislation, that is, in the making of city ordinances. Legislation is assumed to be the function of the city council. But the mayor is empowered to recommend legislative action on the part of the council and also to veto any ordinance which may meet with his disapproval, so that his actual influence over the course of municipal legislation is considerable. Recommendations to the city council are sent by

(a) advis-  
ory.

messages or written communications which are read by the council's clerk and then referred to the appropriate committees. Whether they will be adopted depends to a large extent upon the political relations which exist between the two departments of the city's government. The mayor is usually a local party leader, and if his party controls a majority in the city council, the chances of favorable action by the latter are naturally much greater than when the political situation is reversed.

(b) the  
veto.

Most city charters provide that any ordinance or resolution which passes the city council shall be sent to the mayor for his approval. If the mayor approves the measure, he signs it; if he does not approve he may return it unsigned within a designated number of days, and state his reasons for disapproval. The council may then pass the ordinance over the mayor's disapproval or veto by a two-thirds vote.<sup>1</sup> If it does not do so, the measure remains inoperative. There is also, in most cases, a provision that if the mayor neither signs nor returns a proposed ordinance within the prescribed time, it becomes valid without his signature. The analogy between the veto power in federal and in municipal government is thus plainly to be recognized.

Merits  
and  
defects  
of the  
veto.

The qualified veto, however, has not proved a satisfactory institution in local government. Occasionally it has enabled a courageous mayor to check extravagance and to prevent the imprudent granting of franchises; but more often it has been employed to further a mayor's own political or personal interests quite regardless of the general welfare. The use of the veto power has been far more frequent in the cities than in the nation or the states, so much so that it has enabled the mayor in many cities to become the real dictator of local policy. In its origin and by its design the veto was intended to be an emergency weapon but it has long since ceased to be so regarded. Its employment on all and sundry occasions as a means of enforcing the personal wishes of the executive is a perversion of the veto's true place in the American scheme of government.

(c) ap-  
point-  
ments.

The higher officials of city administration, such as the treasurer, comptroller, city solicitor, police commissioner, superintendent of streets, likewise the members of the various boards and commissions, are in some cases chosen by popular vote. In

<sup>1</sup> In a few cities the requirement is higher — three-fourths.

a few instances, again, they are selected by the city council, but most commonly their appointment is now intrusted to the mayor. The tendency to concentrate the appointing power in the mayor's hands has been increasing in recent years. In many cities, however, there still exists the requirement that appointments made by the mayor to these higher administrative positions must have the concurrence of the city council (or the upper branch of that body) before they become valid.<sup>1</sup> This requirement of aldermanic confirmation is another example of the influence of the federal analogy in local government. Its advantages, however, are seriously open to question, for while the plan has at times served to prevent the making of improper appointments it has more often divided the responsibility between the mayor and the council to such an extent that the people are not able to hold either of them to account. It has been a prolific source of political imposture. Some of the larger cities, New York for example, have abolished the system of council confirmation but most of the others (including Chicago, Philadelphia, St. Louis, and Los Angeles) still retain it. There is a deep-seated popular conviction that the appointing power is too vast to be placed in the hands of any one official without some check upon its exercise.

The President of the United States, as everyone knows, may remove national officials without the consent of the Senate; but in this respect the cities have not all followed the national example. In many instances the city charters stipulate that removals may not be made by the mayor unless the council concurs. So here again is an opportunity for evading responsibility. It is highly desirable that the power of removal should be vested in the mayor alone, and some cities have made it so. Where the appointments have been made under civil service rules, however, it is proper to provide that removals shall not be made except on definite charges and after a public hearing.

Another group of mayoral powers relate to the city's financial administration. These powers differ greatly in extent from city to city, but the tendency everywhere is towards their enlargement. In some cities the mayor is given the sole right to initiate proposals of expenditure, the council being allowed to reduce any item in the mayor's list of estimates but not to in-

(d) removals.

(e) financial powers.

<sup>1</sup> In Boston the approval of the state civil service commission is required.



crease or to insert new items. Boston affords a good example of this system whereby the entire responsibility for all increases in municipal expenditure rests upon the mayor alone. In New York City this responsibility does not rest upon the mayor alone, but is given to a body known as the Board of Estimate and Apportionment, of which the mayor is an influential member.<sup>1</sup> In Chicago, on the other hand, the initiative in matters of expenditure continues to be vested in the city council. On the whole it seems desirable that the function of preparing the city's annual budget should be deputed to the mayor, thus placing the onus for extravagance in a definite spot—when extravagance occurs. When the budget is prepared by the city council, every member is mainly concerned with getting all he can get for his own ward or district. The whole budget becomes, in the vernacular of politics, a "pork barrel" into which every alderman dips as deeply as he can.

(f) miscellaneous.

Some miscellaneous powers usually pertain to the mayor's office. He has the right to investigate the work of the municipal departments; sometimes his approval is required whenever contracts for public works are awarded; and not infrequently he has the powers of a justice of the peace or local magistrate. The mayor represents the city on all occasions of ceremony and ranks as the first citizen of the community. In a few cities he presides at council meetings. Social duties, which are of infinite variety, take a large share of his time and energy, so much so that personal attention to the details of his official work has become exceedingly difficult in the larger cities.

Quality of the mayors.

Mayors, as a rule, have not been men of large caliber. Very few of them, even the mayors of the great cities, have risen any higher in public office. During the past fifty years, in the twelve largest cities of the United States, more than two hundred men have served as mayors. How many of these have become governors, or members of the President's cabinet, or senators of the United States, or have gone upward to any other high office? Very few, indeed. Grover Cleveland was mayor of Buffalo at an early stage of his political career. Perhaps a dozen other

<sup>1</sup>The board is composed of eight members in all, namely, the mayor, the comptroller, the president of the board of aldermen, and the presidents of the five boroughs: Manhattan, Brooklyn, The Bronx, Richmond, and Queens. Sixteen votes are distributed among these eight members, the mayor having three votes.



mayors of large cities have gained some lesser promotion—in other words only five or six per cent of the whole number. The mayoralty is far more often the close of a public career than a midway stage in it.

In addition to its mayor a city which maintains the mayor-and-council system of government has various officials and boards in charge of its administrative departments, such as police, fire protection, highways, water supply, and public health. Originally the management of these departments was divided among committees of the city council (as it is in English cities at the present day); but during the nineteenth century American municipalities broke away from this plan and transferred the work of departmental administration to separate boards or officials. For a time the board system was the more popular, partly because of local prejudice against giving too much power to any one officer, and partly because a board of three or five members gave an opportunity for having both political parties represented on it. But the bi-partisan board rarely proved to be an efficient body, and in many cases it has been supplanted by a single commissioner. The board system has some merits when applied to such departments as poor relief, schools, city planning, or public libraries, in other words where deliberation and discussion are needed. But in other city departments (such as police, fire protection, and health), where quickness of decision and firmness in action are essential, the board system is unsuitable and should give way to administration by a single head.

The officials in charge of the various city departments, whether members of boards or individual commissioners, are either elected by the people, chosen by the city council, or appointed by the mayor. Popular election was at one time the customary method, but it is now used in a few cases only. The council still chooses some of the higher officials in most cities, particularly the city clerk. But appointment by the mayor has become the prevailing plan. The merit system applies only to subordinate officials; in no American city are the heads of departments chosen by civil service competition.

Then there is the city council. Originally it was the chief governing organ of the city, but it has long since lost this place. The council now consists of a single chamber, except in a very

The heads of city departments.

Evolution of this system.

How department heads are chosen.

The city council.

Its  
organi-  
zation.

few cities. The members are elected, ordinarily for terms of from one to four years. The election is either by wards, or by the voters at large, or by some combination of these two plans. Nominations are usually made by means of a primary. In a few cities the members of the council are nominated by a petition and elected according to a system of proportional representation.

Ward and  
general  
ticket  
systems  
of election.

The relative merits of the ward and at-large methods of electing councillors have been the theme of much controversy. The ward system is the older plan and at one time was practically universal. But it was regarded as responsible for the mediocre quality of the men chosen to city councils, especially in the large municipalities, and for the zeal with which every councillor sought to obtain favors for his own district without any allegiance to the interests of the city as a whole. The ward system has accordingly been supplanted in many cities by the plan of election at large. The practical difficulty with this latter method, however, is that some districts of the city are likely to be left unrepresented altogether. Moreover, if elections are conducted on a party basis, as is almost invariably the case, the majority party will elect its entire slate of candidates, leaving the minority with no councilmen at all. To overcome these practical objections some cities have adopted a combination of the two plans, electing one councillor from each ward and also a designated number at large. If a city has nine wards and a council of fifteen members, for example, each voter marks his ballot for seven members, one to represent his own ward and six to be chosen at large. This plan assures some geographical representation and some measure of minority representation as well.

City councils hold regular meetings, usually once a week, and are usually empowered to select their own presiding officer. They also make their own rules of procedure, which are similar to those used in state legislatures, although much less elaborate. Most of a city council's work is done by committees whose members are appointed by the presiding officer. These committees examine into the various matters which come before the council and make recommendations, which may or may not be accepted.

Functions  
of the  
city  
council:

Chief among the functions of a city council is that of making ordinances or local laws. These ordinances relate to a wide variety of matters, the protection of life and property, traffic in

the streets, sanitation, health, housing, weights and measures, bill-boards, places of amusement, and so on. They must not, however, be inconsistent with the provisions of the city charter or any other state law. Ordinances must be enacted with due regard for the prescribed formalities and must in most cases receive the approval of the mayor before they go into effect. But once properly enacted they have the force of law and are enforceable by the regular courts.

(a) the  
enacting  
of ordi-  
nances.

Municipal ordinances must fulfil certain conditions, however, or the courts will not enforce them. For one thing they must be reasonable and not oppressive in character. There is, of course, no general test of reasonability, but the courts have now set up a sufficient number of precedents to serve as a guide. Ordinances, again, must not be discriminatory in their application. They must not single out individuals or groups of persons for special restriction while permitting others of the same sort to be immune. Finally, municipal ordinances must not unduly restrain freedom of trade, freedom of contract, or the other established rights of the citizen. Considerations of public safety, health, and morals are paramount, however, and the freedom of the individual may always be restrained where these considerations require it; but factious or undue restraint will not be tolerated. On the whole, however, the courts have been lenient in these matters, giving the ordinance the benefit of any doubt, where doubt exists.

Legal  
limita-  
tions  
on the  
ordinance  
power.

City councils also possess various powers in relation to local finance. No taxes can be levied, no appropriations made, and no money borrowed except with the council's approval. It is true that the nature of the taxes is determined by the state laws, but the city council by ordinance fixes the rate. The list of appropriations, too, is often prepared by the mayor or by a board of estimate, but no appropriation becomes effective until the city council has given its approval. And in the matter of municipal borrowing the council determines the amount, the term of the loan, and the rate of interest to be paid. But the discretion of the council is not very great. Interest on the municipal debt, expenditures which are made compulsory by state law, the cost of maintaining city property—these must be provided for in any case. So, too, the expense of maintaining the schools, the police and fire departments, and the sanitary sys-

(b) finan-  
cial  
authority.

Limita-  
tions  
as to  
taxation  
and appro-  
priations.



tem cannot be reduced below a certain point. We say that the city council "fixes the tax rate," but the tax rate is nothing but the quotient obtained by dividing the proposed net expenditure into the total assessed valuation of taxable property. And the city council does not really control either of these items.

(c) powers  
in relation  
to fran-  
chises.

In most cities the council retains the power to grant franchises to public service corporations such as lighting, telephone, and street railway companies. In former times it had complete authority over such matters, but grossly abused its trust. Franchises of great value were given for long periods, and sometimes in perpetuity, without securing the city any compensation. The state legislatures accordingly stepped in and their laws now restrict the council's power by providing that no franchise may be granted for more than a certain term of years and that companies which receive such privileges shall be subject to public regulation.

(d) mis-  
cellaneous  
powers.

Finally, a city council possesses some powers of a miscellaneous nature which cannot be readily classified. They include such matters as authorizing the purchase of land for public buildings, deciding the location and naming of new streets, the approval of certain important contracts, the fixing of water rates, and the acceptance or rejection of permissive state legislation, in other words, of laws which are passed by the legislature with a provision that they will go into effect in any city whenever the city council accepts them.

Place of  
the city  
council  
in Amer-  
ican gov-  
ernment.

This brief survey of the council's powers may seem to indicate that they are of considerable scope, but they are not nearly so important as they used to be. The principle of division of powers, as applied to city government, has resulted in transferring the major share of authority to the mayor and to the heads of departments. The council remains the chief legislative organ of the city; but municipal government is not largely a matter of legislation. It is for the most part administrative in character. Building and repairing streets, maintaining police and fire protection, guarding the public health, managing the schools, supplying water, removing waste, caring for the poor—these are the chief functions of city government to-day. The work of making laws is far outweighed in scope, importance, and influence by the function of carrying them into effect. The drift of municipal development in the mayor-and-council cities, there-



fore, is towards a subordination of the legislative to the administrative branch of the government. The same trend has been already noted in the state affairs, but it is much more pronounced in the cities. The situation stands out in sharp contrast with that existing in European countries. There the city council has everywhere retained its position of supremacy.

In addition to the mayor, the heads of departments, and the members of the city council, the work of municipal government requires a large staff of superintendents, foremen, clerks, and other employees. Cities everywhere are large employers of both skilled and unskilled labor. If one adds together all the school teachers, policemen, firemen, library officials, clerks in the city hall, street cleaners, and other workers, the total is far larger than the ordinary citizen realizes. In New York City these employees make up an army nearly one hundred thousand strong. The task of organizing this large corps of employees, recruiting their ranks, getting rid of the incompetent, and making the rest give a hundred cents' worth of service for a dollars' worth of salary—that is the most persistently difficult task which mayors and city councils have to perform.

Three factors have contributed to accentuate the difficulty of this problem. First and most important is the habitual selection of officials and employees on purely political or personal grounds without reference to individual capacity. The spoils system flourishes in many American cities, and even where civil service laws have been adopted the spoilsman sometimes manages to gain his ends. A second factor is the customary absence of any well-defined system of promotion in the municipal service. Promotions have scarcely any relation to individual merit. Political influence is what counts. Employees, moreover, are regularly carried upon the list of active workers after they have become too old or are too indolent to give any fair return for their wages. The chief incentive to diligence is thus taken away. Finally, there is the lax disciplinary organization of the various city departments and the absence of direct personal responsibility for the proper performance of duty. Subordinate officials who have close friends among political leaders often do as they please, disregarding the instructions of department heads. The slack discipline of the city's labor force is proverbial. Municipal employees are voters; to that extent they are their own employ-

The  
city em-  
ployees.

Why they  
have not  
reached  
a high  
plane of  
efficiency.

ers, for they are in a position to exert a strong pressure upon the mayor and the members of the city council.

Inefficiency in the municipal service has not been as gross or as widespread, however, as the literature of reform sometimes implies. In every city there is a large body of employees who earnestly try to give the public the worth of their wages. But the people of the city see or hear little of this class. The officials and employees who give the municipal service its infelicitous reputation for indolence are the ones who can so often be seen in public places during business hours. They are a minority, no doubt, but their actions stamp upon the public imagination its general conception of city employment.

The city tolerates among its employees a measure of incompetence and carelessness which would be fatal to private enterprise because it does not have to bear the strain of competition. The taxpayers must bear the cost, whatever it is. The city, moreover, is in most cases not liable in damages for the incompetence or negligence of its officials and employees, another feature in which it differs from the ordinary business corporation. So far as the city is engaged in the performance of strictly governmental functions, such as police and fire protection, the safeguarding of the public health, and the promotion of education, it is not liable for any injuries which may be directly due to the incompetence of its employees in these departments. The citizen in such cases has no redress. A private corporation, on the other hand, is ordinarily liable for the negligence of its agents or employees whenever any damage is done by them within the scope of their employment, and that fact affords an obvious incentive to the maintenance of efficiency. When a city engages in any non-governmental or business enterprise, such as the operation of a municipal lighting plant or a municipal street railway, it assumes the same legal liabilities for the acts of its employees as are imposed upon private companies; but these enterprises form but a small part of a city's entire administrative work.

The chief defect of the mayor-and-council type of city government, surveying it as a whole, has been its emphasis upon the principle of checks and balances. This has divided authority and promoted friction between the two branches of local government. The endeavor to model the political organization of the

Their popular reputation not wholly deserved.

Cities are not legally liable for the results of incompetence of their employees.

The chief defect of the American municipal system.

city upon that of the federal government was unwise in its day, and has proved to be unfortunate in its consequences. It has resulted in placing upon the majority of American cities a governmental mechanism which is adapted to the making of laws. But what the city needs is a governmental mechanism adapted to the work of doing business, as business is done in the world of to-day, awarding contracts, buying supplies, hiring labor, and getting results without wasting money.<sup>1</sup>

<sup>1</sup>The best study of the mayor-and-council system of government is that contained in Russell M. Story's *American Municipal Executive* (Urbana, 1918).

## CHAPTER XL

### MUNICIPAL ORGANIZATION: THE COMMISSION AND CITY MANAGER PLANS

The city manager plan of municipal government is not the only one for reaching the end in view, but it is the best that has yet been proposed for American cities, and the one most in harmony with the spirit of our institutions.—*A. Lawrence Lowell.*

Two newer forms of municipal organization have arisen and spread widely in the United States during the past twenty-five years. They have displaced the mayor and council organization in several hundred cities. The organic defect of this older plan is its scattering of authority into too many hands. The newer plans concentrate power. That is their most distinguishing feature.

The commission plan originated in Galveston following the partial destruction of that city by a tidal wave in 1900. Prior to this date Galveston was a badly-governed place, but no worse than many other communities of its size. Under a mayor and council system, with various elective officers and a board of aldermen—all chosen on a party ticket—the city afforded a good illustration of misgovernment with the consent of the governed. The municipal debt kept growing year by year. City departments were managed wastefully. Professional politicians were put into places of honor and profit in the city's service. The accounts were kept in such a way that few could understand what the financial situation was at any time. The tax rate was high, and the citizens got poor service in return for liberal expenditures.

Affairs were in this condition when the tidal wave swept over the city, destroyed about a third of it, and put the municipal authorities face to face with a great emergency. Before the disaster the city's financial condition was precarious; now its bonds dropped in value, and it was apparent that funds for the

Our  
most  
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ernment.

Origin of  
the com-  
mission  
plan.

The Gal-  
veston  
plan.



work of putting the city on its feet could not be borrowed except at exorbitant rates of interest. It happened that much of the real estate in Galveston was held by a comparatively small number of citizens. Some of these, accordingly, went to the legislature of the state of Texas and virtually asked that the city be put into receivership. They requested that the old city government be swept away, root and branch, and that for some years, at any rate, all the powers formally vested in the mayor, aldermen, and subsidiary organs of city government be given to a commission of business men. This drastic action they urged as a means of saving the city from involvement in grave financial difficulties, if not from actual bankruptcy.

Acceding to their request, the legislature provided that the citizens of Galveston should elect a board of five commissioners and that these men should have praetorian powers. They were to have both legislative and executive power, thus supplanting the mayor, the department heads, and the city council. At one stroke the doctrine of checks and balances was thrown into the discard. Each of the five commissioners was to be the head of a group of departments and as a body the five were to pass the ordinances, fix the tax rate, make all the appointments—in short, manage every branch of the city's business.

The Galveston plan was not intended to be a permanent system of government for the city. Its prime object was to enable Galveston to tide over a difficult emergency. Prepared somewhat hastily, with very little experience to serve as a guide, it vested in the hands of a small body of men more extensive final powers than most cities would care to give away; but the lapse of a few years demonstrated the great merits of the new system. The business of the city recovered rapidly, and in a remarkably short time the place was again on its feet, financially and otherwise. Then people began to ask why the new form of government should not be kept. Why go back to the old system at all? The other cities of Texas, being impressed by Galveston's experience, began to agitate for a similar system of government; and in the course of a few years the commission plan was authorized for use by general act in all the cities of the state.

Now this experiment naturally attracted attention in other parts of the country, and the reform organizations of various northern cities began to discuss the possibility of applying the

Success of  
the experi-  
ment.

The plan  
spreads  
north-  
ward.

scheme to the solution of their own municipal problems. The first municipality outside of Texas to adopt the plan was Des Moines, the capital city of Iowa. It improved the system in various respects besides adding provision for the initiative and referendum. This seemed to give the movement new impetus and in the next few years the commission plan spread widely in all directions. By 1914 it had been adopted by more than four hundred cities. Then came a lull, followed by a reaction. Many commission-governed cities changed to the manager plan; a few went back to the old mayor-and-council form. Today the list of commission cities is considerably smaller than it was a dozen years ago. Only six cities of more than 200,000 inhabitants retain the plan, but it remains popular in the smaller communities.

The essential feature of the commission plan is a board of five commissioners elected by the people.<sup>1</sup> The commissioners are elected at large for a term of two or four years and are usually paid for their services.<sup>2</sup> One of the five commissioners serves as chairman of the commission and is customarily given the title of chairman or mayor.<sup>3</sup> According to the original commission plan, as established in Galveston, the chairman or mayor was given no veto power and no authority to make appointments; his duties were to preside at meetings of the commission and to keep an eye on the general course of the administration, nothing more. This arrangement has not been strictly followed by other cities, some of which give the mayor additional powers.<sup>4</sup> In any event each commissioner (usually including the mayor) takes charge of a group of administrative functions. As there are only five commissioners, there can be only five departments or groups of departments, no matter how numerous and varied the city's administrative activities may be.<sup>5</sup>

<sup>1</sup> In a few cities there are seven commissioners.

<sup>2</sup> The salary varies with the size of the city. In New Orleans the mayor receives \$10,000 and the other commissioners \$6,000 each; in Buffalo the figures are \$8,000 and \$7,000; in Galveston \$2,000 and \$1,800.

<sup>3</sup> It was originally intended that the commissioners, after their election, should choose one of their own members as chairman or mayor. The more common practice now is to have the people choose the mayor directly.

<sup>4</sup> In some cases the mayor has been given the veto power, as in St. Paul, or the power to appoint the city officials, as in Houston, Texas.

<sup>5</sup> The usual grouping is somewhat as follows: Public Works, Public Health, Public Safety, and two other groups which may be either Accounts and Finance, Public Affairs, Public Property, Public Utilities, or Public Welfare. Various combinations of functions are possible. The apportionment of duties among the commissioners may be done in any one of three

It is now more than twenty years since the commission plan originated in Galveston, and more than fifteen years since it made its way into other communities. This interval has been sufficient to afford the system a fair trial under varied conditions and to permit a tentative appraisal of results. Those who have observed the workings of the plan at close range will not deny that it has some distinct merits and some serious defects, which is a round-about way of saying that it is like most other governmental devices. There is this to be said of the commission plan, however: its advantages lie on the surface where they can readily be appreciated by the average voter, while the defects are of the sort that do not become apparent at first glance. It is an instrument of government which does not appear to improve with use.

Has it  
been a  
success?

What are these advantages and defects? The most obvious merit of the commission plan is its simplicity. It eliminates the diffusion of powers and responsibilities which the mayor and council type of city government has often carried to an absurd extreme. There is but one governing authority—the commission; all municipal powers are exercised by it alone.<sup>1</sup> There are no checks and balances in commission government. The value of this simplicity and concentration is self-evident. Public attention can be focussed upon one governing body; there is no shifting of responsibility from one body of officials to another until the people lose sight of it altogether. There is no opportunity to throw up a smoke screen and bewilder the voters when things go wrong.

Merits of  
the plan:

1. It has  
simplified  
responsibility  
and  
concentrated  
it.

Being simple, the commission form of government is intelligible. One does not need to plough his way through learned treatises to understand it. Mayor-and-council government, complicated by the existence of numerous administrative boards, is often quite unintelligible to the masses of the people. The average citizen does not know where the authority rests, or how it is shared by the various officials. He is bewildered by the interplay of mayoral vetoes, aldermanic confirmations, and departmental friction. Government ought to rest on the consent of

2. It provides a  
scheme of  
government  
that is  
intelligible  
to the  
ordinary  
citizen.

ways, namely, by the direct election of commissioners to specific commissions, by vote of the commission, or by the mayor. The second plan is the one most commonly used.

<sup>1</sup> An exception is usually made in the case of the schools which remain in the hands of a separate board.



the governed; but people cannot give a willing consent to what they do not understand. Government ought to be responsible to the people, and it cannot be so unless it is intelligible. The professional politicians do not want it to be understood. The more obscure the provisions of the charter and the more complicated the structure of the government the easier it is for rings and bosses to pursue their traditional policy. The old form of city government was enshrouded in fog. The commission plan let in the light.

3. It is based on the principle that city government is business.

The mayor-and-council plan is based upon the doctrine that the city's business is government, while the commission plan proceeds on the principle that the city's government is business. The aim of one is to protect the people against the concentration and abuse of power; the prime purpose of the other is to lodge authority where it can be promptly and decisively exercised. And "if city government is business, the right way to conduct it is by electing a board of directors"—so runs the argument. Stated in that form the argument has plausibility which appeals to men and women who do not think deeply or straight, and it proved very effective in campaigns for the adoption of the commission plan.

A query as to this contention.

But is it, after all, a sound argument? The government of a city is not in the strict sense business. It is a combination of government, business, and philanthropy. And in any case the commission plan does not conform to the principles of business management. Every well-organized business has a single directing head; it is not managed by five administrative officers each with equal powers. The members of a board of directors do not divide the administrative duties among themselves; they delegate such duties to a president, a manager, or a superintendent. The commission plan makes no provision for single-headed, unified, direction of the city's affairs. On the other hand, it can fairly be said that the commission plan, by placing a single body in complete and undivided control of all the city departments, has both encouraged and facilitated the use of better business methods in city administration than were practicable under the plan which it displaced.

The commission form of government has set new standards of harmony, promptness and publicity in the handling of the city's affairs. A very sagacious man once said that "in a multitude of



counsellors there is wisdom"; but it was not city councillors that he had in mind when he gave this proverb to the world. A multitude of councillors and other officials, each sharing in the determination of municipal policy, is a far better guarantee of bickerings and inaction than of collective wisdom. Five men can work in harmony where fifty cannot. The more numerous the members of a governing body the greater is the temptation to the use of obstructive tactics and the greater, also, is the likelihood that matters will be settled in secret conclave by a few. Under the commission form of government it is not insuperably difficult to secure the harmonious, expeditious, and public trans-action of business. No form of government, of course, offers an absolute guarantee that public affairs will be conducted in this way, and the experience of the past twenty years has proved that even small bodies of city commissioners can form cliques, play politics, sacrifice public interest to personal ends, and do business behind closed doors. But it will hardly be denied that such things are less common under the commission plan than where the authority is apportioned among mayors, boards, and councils.

When the commission movement was spreading like wildfire through the country, ten years or more ago, its more enthusiastic advocates predicted that the new system would enable the cities to draw better men into the municipal service. The mayor-and-council form of government, they said, provided too many elective offices and by so doing placed a premium on mediocrity. No city can elect forty or fifty officials at a single election without finding some culls in the lot. It is a commonplace of practical politics that voters will not exercise much discrimination when a long list of candidates is set before them at the primaries or the polls. But with the number of elective officers reduced to five, it was said, the situation would be different. The five commissionerships would appeal to the best men of the community, to men who had made a success of their own affairs. It was predicted that "men who had retired from business" would be willing to give their services to the city under the commission plan. But this prophecy, like many others in the literature of reform, has not been very amply fulfilled. The caliber of municipal officeholders is not a thing that lends itself readily to any form of statistical computation, but there is plenty of evidence to

4. It has promoted harmony, promptness, and publicity in the municipal service.

5. It has tended to improve the quality of elective office-holders, but not to the extent that was predicted.

prove that the adoption of commission government has not brought a wholly new type into the municipal service.<sup>1</sup>

Nor is this surprising. Elective offices under any plan of municipal government are likely to go to men who have a wide acquaintance among the voters and who are willing to exert themselves politically. Popularity and persistence will help a man to win election at the polls, whether he be one candidate among five or one among fifty. It is probably true, nevertheless, that the general average of personal qualifications among candidates has been raised by reducing the number of offices to be filled and in any event it is beyond all reasonable doubt that the commission plan affords even mediocre officeholders a better opportunity to achieve results. It is the testimony of men who have held office under both systems that the commission plan, with its concentration of power and responsibility, affords better incentives to good work and more favorable opportunities for doing it.

When municipal reformers set out to convince the people that some new governmental mechanism ought to be adopted it is their usual practice to predict that the change will reduce expenses, lower the tax rate, and give the city a greater return for a smaller outlay. Such promises, in nine cases out of ten, merely create expectations which cannot be fulfilled. It is a reasonably safe prediction to make in any city, at any time, that taxes and expenditures will keep going up no matter what form of government is adopted. This is because the citizens in all progressive communities are insatiable in their demand for more service, and better service, no matter what it may cost. The adoption of the commission plan has not enabled cities to reduce their expenditures and no one should ever have committed the folly of promising that it would do so.

There are some substantial objections to the commission form of government which the experience of the past two decades has made plain. First and most important among these is its failure to effect a real concentration of administrative responsibility. The commission is a five-headed municipal executive, a pyramid without a peak. It has the weakness which

<sup>1</sup> A study of the personnel in ten cities, some years ago, showed that of fifty commissioners then in office, no fewer than 36 had held some elective or appointive municipal position under the mayor-and-council form of government which preceded.

The plan has not altogether fulfilled expectations in lowering tax rates.

And it has some real defects.

characterizes all types of board-government in that it easily becomes a house divided against itself. The five commissioners often fail to agree, and the temptation is for three of them to combine against the remaining two.<sup>1</sup> This is what has happened in many cities. It is also an essential weakness of the commission plan that although each commissioner is given charge of a department his colleagues can overrule him on any point. And when they interfere, the commissioner in immediate charge of a department is free to declaim responsibility, whereupon we have the old confusion re-installed. This is an organic defect, not a merely incidental one. It is a weakness inherent in the plan itself; it does not arise from the jealousy and sensitiveness of the officials whom the people elect. The various city departments cannot be treated as separate entities and managed independently without reference to one another. There must be some co-ordinating supervision. When a commission of five men undertakes to dictate how each of its own members shall manage his own department all harmony goes a-glimmering. You cannot combine unified control with departmental independence. The commission plan is fundamentally unsound in that it makes no provision for a strong mayor, a city manager, or any other individual apex of control and responsibility. Doubtless it is better to distribute administrative power among five men than among fifty-five; but to concentrate it in the hands of one man, holding him duly responsible for its exercise, is better still. Plural executives rarely give satisfaction; they have shown their weakness in county administration throughout the United States, and in the New England towns they are breaking down whenever the community grows large enough to create difficult administrative problems.

So a commission of five members is too large to assure the unified and harmonious direction of city administration. On the other hand it is too small to serve satisfactorily as a legislative body in any large community. The body which enacts the ordinances, determines the tax rate, votes the appropriations, authorizes loans, and decides other questions of general policy should be large enough to reflect in its membership the more

1. It does not provide a unified executive.

2. It is inadequately representative.

<sup>1</sup> See the article on "The Weakness of the Commission Plan," by C. M. Fassett, in *National Municipal Review*, Vol. IX, pp. 642-647 (October, 1920).



fundamental variations of opinion among the people. This does not mean, of course, that it should be large enough to represent every shade of opinion, political, racial, religious, social, and geographical. A council or commission chosen on that basis would be too big and unwieldy. How large a city council or commission ought to be in order to serve as a trustworthy mirror of public opinion depends upon the size and character of the community. In cities of 20,000 population or less a body of five members ought to be sufficient, and it is among such municipalities that the commission plan has had its greatest vogue. But in large communities it is difficult to see how any adequate representation of substantial interests can be accorded in a body of only five members. The suggestion will be made, of course, that five men can reflect public opinion just as well as forty if they try to do it, and that is undoubtedly true. But the voters will never be convinced that they are actually represented in a body which rarely or never contains anybody from their own neighborhood or of their own class. When nobody from the east side, or from the north end, is to be found among those who direct the course of municipal policy it is idle to argue with the east-siders or the north-enders that this is a matter of no consequence, because their interests are being conscientiously looked after by broad-visioned men who live in other parts of the city. You may be stating the truth, but they will not believe you. The notion that representation is a matter of party, class, race, religion, and neighborhood has a deep anchorage in the American group-mind.

Another practical objection to the commission plan is that it discourages the placing of capable and experienced officials at the head of the various city departments. Each commissioner, as has been said, becomes an administrator. It was contemplated in the original commission plan that the commissioners themselves would have no special qualifications for administrative work and that they would devolve the bulk of it upon experts. In other words it was expected that each commissioner would occupy a position and exert an influence similar to that of the committee-chairman in English cities. But this expectation has not been realized. In the general haziness as to what duties a commissioner ought to perform, men have often been chosen because they possessed some pseudo-qualifications for the position

3. It has failed to make sufficient use of experts.



in sight.<sup>1</sup> The practice of paying each commissioner a substantial salary has also had an influence in expanding the functions of these officials far beyond what they were originally intended to be. To make a show of earning his salary each commissioner naturally feels that he ought to be the real and not merely the nominal head of his department. Most cities, moreover, cannot afford to pay two salaries for the same work, one salary to an elective commissioner of public health, for example, and another to a qualified public health expert. The members of the commission, accordingly, have been tempted to go beyond their depth, and to handle problems quite beyond the competence of the ordinary layman. No one can be divested of his strictly amateur status by merely calling him Commissioner of Public Works, or by giving him any other euphonious title. Laymen cannot be transformed into experts by the alchemy of a ballot-given designation. Jersey City, some years ago, chose an undertaker as its commissioner of health; in Topeka the commissioner of public utilities was a barber by trade; in Houston, Texas, a machinist became commissioner of finance.<sup>2</sup> There is no reason, of course, why the pursuit of any honest occupation should debar a man from service as a *representative*, but the capable management of a municipal department demands something more than honesty and good intentions.

To ensure the permanent bettering of municipal administration it is essential not only that the frame of government be simplified, and responsibility centralized, but that accounting and financial methods be improved, the merit system be extended, opportunities for corruption and wastage eliminated, publicity introduced into all the departments, business methods adopted, and measures taken for arousing the interest of the people in municipal issues. These far-reaching reforms, it stands to reason, cannot be brought about by merely changing the type of government. The framers of commission charters have been

4. It has not always been accompanied by internal reforms.

<sup>1</sup>This has been particularly the case in cities where the commissioners are elected directly to the headships of designated departments. Under the original commission plan all the commissioners were elected on an equal footing; then, after election, they divided the departments among themselves. But some cities did not like this arrangement so they provided that the designation of each commissioner to a specified department should be made by the people at the polls.

<sup>2</sup>For some further examples see Raymond B. Fosdick, *American Police Systems* (New York, 1920), p. 176.

inclined to overlook the elementary fact that success or failure in obtaining full value for public expenditures does not depend wholly, or even largely, upon the form of organization. In large measure it is related to the way in which city officials are required to do their work. In every branch of the city's business, whether it be the keeping of accounts, the framing of budgets, the letting of contracts, or the borrowing of money, there are right ways and wrong ways of doing things. Left to themselves the officials will usually choose one of the wrong ways, not from sheer perverseness, but because they do not know any better. Put an amateur in charge of any technical enterprise, from paving a street to dealing with a criminal, and if he hits upon the right way it will be by miracle. The wise architect, when he plans a building, leaves nothing to imagination or surmise on the part of those who are to do the work. On the contrary, he prepares plans and specifications covering even the minutest details, and he expects these to be scrupulously followed. Those who plan systems of municipal government cannot be so precise, but they have been remiss in leaving so many essential things as hostages to fortune.

In view of the organic and incidental shortcomings which the commission plan has disclosed in actual operation it is quite unlikely that American cities, especially the larger ones, will find emancipation from their difficulties by adopting it. Many small communities will doubtless retain it, and continue to find it satisfactory; but such places can get along with any form of government provided it is simple. Among cities of 100,000 population or more it is not probable that the commission form of government will make new converts. It is weak at the very point where a plan of government must be strong in order to facilitate the solution of those complicated problems which confront the great urban communities of today. Let it not be concluded from all this, however, that the commission movement has failed to render a great service to the cause of municipal reform in the United States. It embodied a protest against an old order, and as such it was exceedingly effective. It compelled American cities, both big and little, to clean house. By its phenomenal spread it carried an impressive lesson. It showed the politicians that the people, when driven to it, will not scruple to wipe the slate clean and begin anew, and that they will not be

The  
future  
of the  
commis-  
sion plan.

deterred from such drastic action by the halo of tradition which surrounds institutions of long-standing. The commission movement worked a complete revolution in the governments of several hundred American communities, and a partial revolution in the governments of quite as many more. It set things going in the right direction, and they are still headed that way.

### THE CITY-MANAGER PLAN

The two fundamental defects of commission government, as indicated in the foregoing paragraphs, are, first, its failure to make provision for a unified central control over the entire administrative work of the city, and, second, its practice of putting the various city departments under the supervision of men who have no technical qualifications, but who nevertheless try to do the work of experts. Almost from the very outset these weaknesses began to show themselves.<sup>1</sup> It was soon discovered that harmonious and efficient municipal administration is not merely a matter of electing fewer men, giving them high-sounding titles, and having them sit in public session at a round table. Personal rivalries within the commission's membership, with each commissioner striving to gain the largest share of public applause, often prevented the development of any constructive leadership. City government, after all, does not consist merely in settling questions which have attracted great popular interest; the larger part of it has to do with matters of humble routine in which the public does not seem to be interested at all.

The two most conspicuous defects of the commission plan.

So municipal reformers set out to devise an improvement in the commission plan which would overcome these defects. They turned to the analogy of a business corporation and decided that instead of having the five commissioners divide the work of administration among themselves they ought to hire a "manager" to do it for them, just as the directors of a railroad or bank are in the habit of doing. Thus there would be a separation of legislative and administrative *functions*, but no division of ultimate responsibility.

The city manager plan.

The first large city to try the "manager" plan was Dayton, Ohio.<sup>2</sup> The city was inundated by a flood in 1913 and during

Its origin in Dayton.

<sup>1</sup> See the article on "Ten Years of Commission Government" in *National Municipal Review*, Vol. I, pp. 562-568 (October, 1912).

<sup>2</sup> Some smaller places, notably Staunton, Va., were already experimenting with it.



the emergency which followed this disaster the existing city authorities showed themselves conspicuously incompetent. So the people quickly created a charter commission, set it to work, adopted its recommendations, and put the new plan of government into force on January 1, 1914. It was designated as the city manager plan. Dayton's experience was watched with interest during the next few years by many other cities. The new government appeared to be achieving good results and the city manager plan started to spread. It spread widely, and is still making converts. At the present time it is operating in about three hundred cities, most of which are small communities with less than ten thousand inhabitants. The list includes one city of nearly a million (Cleveland), one of nearly half a million (Cincinnati), and about a dozen with populations exceeding 50,000.

Its essential features.

What are the outstanding features of this plan? First, there is a commission or council (usually five or seven members) elected by the voters of the city.<sup>1</sup> This constitutes a "policy-determining" body. It enacts the ordinances, makes the appropriations, authorizes borrowing, grants franchises, and decides all general questions. But it does not assume any direct share in the executive or administrative work of government. Instead it appoints a chief administrative official known as the city manager and devolves this work upon him. In other words the council hires a general manager of the municipal corporation.

Functions of the city manager.

The functions of the city manager may be grouped under four heads. *First*, he is the commission's advisory expert on all questions of municipal policy. He attends its meetings, takes part in the discussions (but does not vote), and provides the commissioners with such data as they may need for reaching decisions. He is the connecting link between the legislative and administrative departments of the city government. In this advisory capacity a city manager who knows his business and possesses the right personality can exert a great deal of influence. *Second*, the city manager is the commission's agent for enforcing the ordinances and carrying its votes into effect. In this respect he inherits a function which belongs to the mayor in the mayor-and-council cities. *Third*, he has the right to appoint and remove all municipal officials, subject, of course, to the civil serv-

<sup>1</sup> In Cleveland the council contains twenty-one members elected by four districts according to the principles of proportional representation.



ice regulations. These regulations usually give the city manager a free hand in selecting the heads or directors of departments, but require that appointees to all subordinate positions shall be taken from lists supplied by the civil service board. Subject to the same restrictions he has the right to suspend or to remove appointive officials. *Fourth*, the city manager takes entire responsibility for the conduct of the various municipal departments, streets, police, fire protection, and the rest.<sup>1</sup> It is his duty to instruct the directors or heads of these departments, to secure a proper interlacing of their functions, to investigate complaints concerning their work, and to compose any differences which may arise among them. In a word he controls the various activities like the general manager of any business concern.

The city manager is chosen for no definite term. He may be dismissed by the council or commission at any time. He need not be, at the time of his appointment, a resident of the city. Indeed it has been quite common for cities to bring in an outside manager. He is paid a good salary, gives all his time to his job, and is assumed to be secure in his position so long as he does his work acceptably. Members of the council are forbidden to interfere with him in the performance of his administrative work. Even a cursory study of the plan will show that it is sound in its definite concentration of responsibility. The city manager appoints all the subordinate officials and they are responsible to him. He, in turn, steers all responsibility into the hands of the council who are the representatives of the people.

But how has the plan actually operated during the past ten years? That is an important question because the workings of a government do not always run according to its design. It is yet rather early to make an inventory of the results which the city manager plan has achieved; but some merits and defects have already disclosed themselves with sufficient sharpness to warrant a word of comment. The placing of a manager at the head of a city's administration has unquestionably tended to unify the work of the various departments and to eliminate friction among them. It has paved the way for the introduction of better budget-making methods in the smaller cities, as well as for improved accounting, the centralized purchasing of supplies, and the honest awarding of contracts. Floating debts have been

Merits of the plan as disclosed in actual operation.

<sup>1</sup> The school department is usually excepted, and sometimes poor relief also.

wiped out in many cities and expenditures kept within the appropriations. There has been a noticeable improvement in administrative routine, in the methods of reckoning unit-costs, and in the fixing of regular salary schedules for city employees. For the most part the plan seems to be maintaining its hold on the confidence of the voters, although the complaint is sometimes heard that city-managers give so much attention to matters of "efficiency" that they get out of touch with the everyday sentiment of the people.

On the other hand the adoption of the city-manager plan has not enabled cities to lower their tax-rates, or to make any appreciable reduction in annual expenditures, or to cut down their bonded indebtedness. It has accomplished some of these things in individual cities, but not in general. It has not always eliminated the evil of deficits at the end of the fiscal year. The excuse is offered that no form of government could have availed to prevent the increase of municipal tax rates and indebtedness during the past half dozen years, and there is much force in that contention. Save in a very few instances the city-manager plan has not yet had a full and fair trial. We have yet to see what it can accomplish under normal conditions.

One thing, however, has become plain enough, namely, that the city managers are themselves destined to be the biggest factors in determining the ultimate success or failure of the plan. The framers of the Dayton charter realized this, and insisted that the commission should have an absolutely free hand in selecting the best man available, either from inside or outside the city. Other communities have followed the same course, and have given their commissions or councils a like discretion. It is in accord with the spirit of the plan that a non-resident shall be chosen without any hesitation if he seems to be the best man in sight; likewise that he shall be paid a salary in keeping with his attainments, and that when installed in office he shall be left there so long as his work proves satisfactory. There is assuredly no fault to be found with these ideals; it would be an admirable thing if they could be transformed into realities. But the practical question is whether American cities, as their electorates are now constituted, are going to live up to them.

There are some indications that they are not being lived up to. Almost everywhere there is a growing insistence that the city

What it  
has failed  
to do.

The most  
important  
factor in  
determin-  
ing suc-  
cess or  
failure is  
the  
manager  
himself.

manager shall be a local man, not an outsider. In Cleveland, candidates for election to the council were asked to pledge themselves that, if elected, they would vote against the selection of an outsider and most of them did so. They chose a local man. In a few instances the people have virtually elected the city manager by thus pledging the council candidates in advance.

This way of doing things, if it should become general, would soon bring the plan to grief. Administrative skill and experience cannot be secured in American cities by any form of popular election. Insistence on the appointment of a local man is almost certain to mean, in the long run, the selection of some local politician who is influential enough to promote the election of his friends as members of the commission. If the people will tolerate it, politicians will electioneer for the office of city manager as they have electioneered for the office of mayor; they will organize, build up political machines, and endeavor to see that men of independent attitude are not elected to the commission. From a pledged-in-advance commission it would be but a short step to the direct election of city managers by the people. If it ever becomes apparent that the commissioners are not free agents the people will insist on taking the choice of the city manager in their own hands. They will supplant indirect by direct election. This is not a prophecy; it is merely a statement of what has always happened in similar circumstances. In America when the voters do not like the way officials are nominated or elected by their representatives the usual remedy is to have the people do the job themselves. That is why we changed the method of choosing senators; that is why the direct primary has replaced the party convention. It is essential to the preservation of the city-manager plan, therefore, that the choice of the manager be made by a commission which is unpledged and free to select either an outsider or a local man as it may deem best. No system of appointment can ever achieve satisfactory results if the appointing authority is reduced to the mere function of registering decisions which have been made for it by others.

The greatest problem of city-manager government is to get the right manager. But no city can hope to obtain a competent manager unless it is prepared to pay the price. It must pay a higher salary than it was accustomed to pay its mayor. And local sentiment often recoils from doing this. A business cor-

The most serious danger which the city manager plan now faces.

The salary of the city manager.

poration with an annual turnover of a few million dollars does not hesitate to pay its manager fifteen to twenty thousand dollars in salary each year; but the people of the city balk at doing anything of the sort. Only ten cities in the United States pay their managers ten thousand dollars or more. There are many voters to whom ten thousand dollars looks more like a fortune than a salary. If you assure them that business corporations pay their managers a good deal more than this, they will merely reply that it is more than they are worth, and that if managers got less, the workmen would get more. The average voter thinks of the city manager in terms of work rather than in terms of responsibility. The position looks to him like a soft job, no more difficult than that which the mayor has been performing. He does not realize the breadth of the difference between the competence of a political pot-hunter and that of a skilled administrator.

It is readily demonstrable, of course, that the position of city manager requires professional and personal qualities of a high order, and that it demands from the incumbent a degree of administrative capacity which would command a high scale of remuneration in private employment. The successful city manager must not only be well versed in the technical phases of city administration; he must have energy, and good judgment; he must be able to get along with his superiors and with his subordinates. Men possessing these qualities are none too plentiful; their services are worth a good deal to large corporations. They will not serve the city for less; on the contrary they are almost certain to insist upon more, for private employment offers promotions and security of tenure, which the service of the city does not. Thus far the profession of city manager has given very little indication that it affords a promising career.<sup>1</sup> Nearly half the men who have entered it since 1914 are already out and at something else. Very few have managed to stay in the same office more than three or four years. Many have found the responsibilities too onerous or the salaries too low and accordingly have taken the first good opportunity to transfer into private employment. Not a few have proved unsatisfactory and have been dismissed in some cases without good reason.

<sup>1</sup> Joseph Cohen, "City Managership as a Profession," in the *National Municipal Review* (Supplement), July, 1924.

Cities  
must pay  
for skill  
at the  
market  
price.



One serious defect of the plan is that it makes no provision for authoritative political leadership. The city manager is an expert; he is supposed to take no hand in local politics. The council has a chairman (sometimes called a mayor), but he has no independent authority and is not vested with the function of political leadership. Yet leadership there must be; the people insist on having it. If it is not provided from inside the frame of government they will find it outside. It is well enough to say that "city government is business," and that politics should have no relation to it. But city government is not merely business, as will be indicated in the next chapter. It is a combination of business and politics—with politics usually the more conspicuous of the two. You cannot keep politics out of city government, or out of any other form of government except a despotism. Sound government demands sound political leadership, which the city manager plan makes no attempt to supply.

The  
question  
of poli-  
tical  
leadership.

So we cannot yet be sure that we have reached finality in deciding upon the best form of government for American cities. But we have made progress and are making it. Old theories have been discarded; obsolete political mechanism has been relegated to the scrap heap. New institutions are being given a fair trial. With this has come an awakened interest in municipal affairs, and things which were not understandable to the average man have become intelligible now. Even where the old mayor-and-council form of government is still retained it has been greatly simplified and improved. There have been collateral improvements in the methods of administering the municipal affairs—in budgetmaking, in accounting, in awarding contracts, in purchasing. American cities have made more progress toward honest and efficient government since 1900 than they were able to make in the preceding half century.<sup>1</sup>

Conclu-  
sion.

<sup>1</sup> There is an abundance of material relating to the commission plan and the city manager plan. The best of it is listed at the close of Chapters xvi-xvii of the author's *Government of American Cities* (fourth edition, New York, 1926).

## CHAPTER XLI

### MUNICIPAL ADMINISTRATION

In many of its more important aspects a city is not so much a miniature state as it is a business corporation, its business being to wisely administer the local affairs and economically spend the revenue of an incorporated community. As we learn this lesson and apply business methods to municipal affairs, we are on the right road to better and more satisfactory results.—*John F. Dillon.*

At the close of each year the city authorities issue a printed volume, its pages well packed with figures of all sorts. This is called the annual report; it contains a statement of revenues and expenditures compiled by the auditor, a summary of what each department has done during the year, and a great many other facts about the work of the city officials. Very few people ever read these annual reports, and not many would understand them if they did. But any thoughtful man or woman who takes the trouble to look through one of these publications from cover to cover would be tempted to ask the question: Why do they call such things *government*? They are not government in any sense, nothing but *business*. Here is an account of how streets have been paved, water purified and distributed to the people, school buildings constructed, supplies purchased, contracts awarded, labor employed, money collected and money paid out—why do they call these things government when they are simply business operations and nothing else? The problems that arise in connection with them are business problems; the methods needed are business methods; the organization best fitted to do the work is a business organization.

Now there is a good deal to be said for this point of view. A large part of the city's work is not governmental in the usual sense; it does not consist in making or enforcing laws. Most of the laws which now apply within the confines of the city are made by the state legislature. Even in a large municipality there are surprisingly few ordinances to be made by the city

Government or business: Which is it?

Extent to which it is applicable.

authorities in the course of an entire year. Most of the city government's work has to do with the voting of appropriations, the appointment of officials, the employment of labor, the awarding of contracts, the purchase of supplies, and other business functions which ought not to be performed in a political or partisan spirit. It is work which requires honesty, skill, and experience on the part of those who do it. It is work that cannot be well done if political influence and personal favoritism are permitted to sway the minds of the authorities. In so far as politics influences business, whether in the city or elsewhere, this influence is harmful in nine cases out of ten. The main thing is that the work be done intelligently, honestly, and with reasonable promptness.

Nevertheless, and in spite of all this, the administration of a city is not merely a business problem. It is a good deal more than that. The business analogy, if pressed too far, does harm. The aim of business, let us not forget, is to make a profit and to do this as easily as possible. The aim of a city government is not to earn a profit but to promote the best interests of the citizens as far as the financial resources permit. The city's mission is not to make money but to spend money. Business must produce a surplus, but the city does well if it manages to make both ends meet. The city authorities, moreover, must spend money in accordance with the desires of the people; they cannot follow their own judgment alone in determining what is the wisest expenditure. A business organization does not have to heed public opinion at every turn, but the officials who carry on the business of the city must always defer to it. They must give effect to the desires of the citizens, even when those desires are at variance with what the experts believe to be the best policy. For this reason the officials of a business organization have a far greater range of discretion; they can plan and decide with a freedom which the city officials do not possess. One reason why municipal affairs are not always conducted in a businesslike way may be found in the simple fact that public opinion is sometimes headstrong and expresses a preference for methods which are not businesslike. The city official must reckon with this public opinion, even though it be dictated by mere whim or prejudice. In a word it is not enough to have government *for the people* of the cities; it must be government *by the people* as well.

Where the analogy fails:

1. Business and government do not have similar aims.

2. The work of the city is social as well as economic.

Another consideration is worth bearing in mind. Some branches of municipal administration lend themselves very easily to the use of business organization and business methods, while others do not. The street department is a good example of the former class of functions. Acquiring land for new streets, paving them, cleaning them, keeping them lighted—these things are almost exactly of the nature of ordinary business operations. The sole problem is to get the best results for the amount of money expended. Consequently the methods used, so far as practicable, ought to be strictly business methods. But this does not hold true to the same extent in the department of public charities or poor relief or public recreation. In these branches of work the human touch is essential. It will not be denied, of course, that here also the aim is to get the best results for the money, but this cannot usually be done by applying the routine methods of a business concern. Placing poor relief on “a strictly business basis” would almost certainly lead to misunderstandings and resentment; in the long run the harm would more than counterbalance any saving that might be made. Poor relief and correction ought to be placed, first of all, on a humane and sympathetic basis. Business methods should be applied in so far (but only in so far) as they are consistent with this.

The administration of a city, therefore, is more than “a series of business problems.” It must take political and social, as well as economic, conditions into account. It is, in general, the problem of satisfying a large number of headstrong and cantankerous people who often desire things which are not for their own best interest. Of such is the kingdom of democracy. To make a city administration efficient, while still keeping it popular, is a far more difficult task than most of our municipal reformers realize.

The administrative activities of the American city fall into a number of general divisions. First are the protective functions, as they may be called, the maintenance of police and fire protection. This includes not only the safeguarding of life and property by the usual methods, but all measures that are taken for the prevention of crime and conflagration. Second comes a group of activities connected with public works such as streets, parks and public buildings. City planning naturally has a close relation to this branch of municipal administration. Third there are

The general divisions of the city's administrative work.



activities connected with public health and sanitation. Fourth comes education, recreation and public welfare. Fifth there are varied functions relating to public utilities, such as water supply, lighting and transportation. Sixth we have financial administration, including such matters as assessments, taxation, expenditures, auditing, and loans. And, finally, there are numerous administrative activities of a miscellaneous sort which do not fall readily into any of the foregoing groups.

Municipal administration, therefore, covers a wide range. It includes activities of a most varied character ranging all the way from the registration of births to the planning of bridges, from the holding of elections to the cleaning of filter beds. Obviously the work has to be apportioned among various departments—a street department, water department, health department and so on. The number of these departments must depend upon the size of the city and the scope of its administrative activities. Under the commission plan of government there can be only five departments. In a large city this is too few. It involves the crowding of unrelated functions into the same department. On the other hand the tendency in most mayor-and-council cities has been to multiply the departments needlessly. Some have twenty or thirty of them. The proper number cannot be determined by applying any rule. There ought to be enough administrative machinery to do the work, and no more. The heads of departments ought to be appointed by the mayor or the city manager. Some departments (such as police and fire protection) are best managed by single heads; others (such as poor relief, parks, and public recreation) may very well be placed under the control of a board. In any event the heads of departments should be responsible to the chief executive and to him alone. It is only in this way that good coöperation among all the departments can be secured.

Public safety, the safeguarding of life and property, is an important function in all organized communities. It includes primarily the two departments of police and fire protection. Modern police organization began in 1829 with the enactment of Sir Robert Peel's famous statute for reorganizing the police administration of London. This statute swept away the old watch and ward system of day-constables and night-watchmen, replacing it with a body of professional, uniformed police offi-

Breadth  
of its  
range.

Public  
safety.  
What it  
includes :  
(a) police.

cers.<sup>1</sup> The results were so advantageous that other English cities adopted the plan, and it was eventually copied by American municipalities as well. To-day the work of policing is intrusted in all urban communities to officers who devote their entire time to the service. The system of part-time constables remains in small towns and rural areas only.

Police  
control.

In large American cities the police department is headed by a board or a single commissioner, the latter being the more common plan.<sup>2</sup> He is usually appointed by the mayor; but in three large cities the heads of the police department are appointed by the state authorities.<sup>3</sup> In those cities which have adopted the commission type of government the police and fire departments are invariably combined under a commissioner of public safety, and this plan is also followed in some cities which retain the mayor-and-council form. In smaller and medium-sized communities this combination has some important advantages, but in large centres each department is of sufficient importance to have its own head. The commissioner, superintendent, or chief is in immediate charge of the entire force and supervises its work from headquarters.

Police  
organi-  
zation.

For purposes of police administration a city is usually divided into districts or precincts with a police station in each. The members of the police force are graded in semi-military fashion into various ranks: captains, lieutenants, sergeants, patrolmen, and sometimes reservemen. The captains are in charge of stations, the lieutenants taking command when captains are absent. The sergeants do desk-work in the stations or perform inspectorial functions. The patrolmen perform the active function of enforcing the laws and maintaining order. Various members of the force are detailed to special duties as traffic officers, or detectives, or attendants at the courts. In round figures there are about twenty police officers for every ten thousand people in all large communities.

<sup>1</sup> Sir Robert Peel, who established the first regular police force in England, made himself very unpopular for a time by this step. The members of the new police force, by way of ridicule, were called "peelers" and "bobbies," and these nicknames persist in England to the present day. They wore (and still wear) blue coats with copper buttons, for which reason the London youngsters also referred to the policeman as "the copper." In America we have shortened it to "the cop."

<sup>2</sup> Sometimes called superintendent, marshal, or chief.

<sup>3</sup> St. Louis, Boston, and Baltimore.

Whether police administration will be honest, efficient, and humane depends in large measure upon the patrolmen. The method of selecting these officers is accordingly a matter of prime importance. Forty or fifty years ago it was the invariable custom to let political and personal influence dictate both appointments and promotions, but to-day in a great many cities the police department has been brought under civil service rules. Likewise it was the practice to set patrolmen at work without any preliminary training, but the largest cities nowadays maintain regular training schools in which the essentials of a police officer's duty are taught. The smaller cities will no doubt make some similar provision in time.

Essentials  
of good  
police  
organi-  
zation.

European and American police systems have frequently been compared to the disadvantage of the latter. The almost entire absence of police scandals in English and French cities has been contrasted with their all-too-frequent recurrence in the cities of the United States. It should be borne in mind, however, that the problem of satisfactory police administration is a much more complicated and difficult one in America than it is on the other side of the Atlantic. In European cities the populations are homogeneous, and almost wholly native-born; in the majority of large American municipalities there are great elements of alien inhabitants with no uniform traditions of personal liberty. European police, moreover, have wider powers and are not restricted to the same extent by constitutional provisions which protect the rights of the citizen.

European  
and  
American  
police  
compared.

Nevertheless the standards of police administration in American cities are far higher than they were a generation ago. This is due in part to better methods of organization, particularly to the abolition of the bi-partisan police board and the concentration of authority in a single police commissioner. In larger measure, however, it has resulted from improved methods of recruiting and training the force, better pay, and greater security of tenure. Police officers are no longer in most of the large cities appointed, promoted, reduced in rank or dismissed at the behest of ward politicians. Much still remains to be done before this branch of municipal administration is in all respects as satisfactory as it ought to be, but the progress of the past twenty years gives ample ground for optimism.

Recent  
improve-  
ments.

In recent years the growth of traffic congestion has placed a

The prob-  
lems of  
traffic  
regulation.

new and heavy burden upon the police establishment. Twenty years ago there were no traffic officers in any except the largest cities and very few of them even there. To-day the officers assigned to traffic duty during the day hours constitute in some cities more than one-quarter of the entire force. In addition many traffic officers are now assigned to night duty near theaters and other places of amusement. It is customary in the larger communities to have a traffic division within the police department, and the officers who serve in this division are either connected with police headquarters or are distributed to the several stations. In New York City there are special traffic subdivisions independent of the regular police districts. Patrolmen are detailed to the traffic division from the regular force, but in the larger cities they are given some special training in traffic duties before being assigned.

Police  
courts.

The maintenance of law and order in cities depends not only upon the efficiency of the police, however, but upon the honesty and fairness of the local courts. The magistrates or judges of these municipal courts are usually elected, and too often their attitude towards the strict enforcement of the law is influenced by political considerations. It is sometimes argued that the practice of electing these judges of city courts is advantageous because it secures men who know and understand the conditions under which the people live and who can on that account administer the laws more justly. But on the other hand the elective system has its manifest dangers in the way of political chicanery and boss domination. Some large cities, therefore, have provided that the judges of the municipal courts shall be appointed by the mayor.

(b) fire  
protec-  
tion.

The second branch of public-safety service is the protection of property against destruction by fire. This includes two separate functions, namely, fire-prevention and fire-fighting. Until recent years very little attention was bestowed upon the former, while so much was given to the latter that American fire-fighting organizations became easily the best in the world. The annual wastage by fire loss in the United States is appalling. In the cities alone it is over one hundred million dollars every year; in the rural districts it is even larger. The chief reasons, of course, are the high percentage of inflammable wooden structures, the laxity of the laws relating to fire hazards, and that most con-



spicuous of American traits, the readiness to take chances on all occasions.

The science of fire-prevention, which has made noteworthy progress in recent years, is concerned primarily with four remedial measures. First, there is the fixing of what are commonly known as fire-limits, that is to say, regions in which inflammable buildings are not to be erected. These areas usually include the business sections of cities. Second, the cities have tried to eliminate by the provisions of ordinances relating to buildings, those structural features which experience has shown to be fire-spreading agencies, such as the combustible party wall in apartment houses, the wooden-shingle roof, the unprotected elevator-well, and the inflammable connection which so often exists between the cellars and the first floors of tenements. Third, the science of fire-protection has been applied to special structures such as theatres, factories, department stores, and schools by the enforcement of rules adapted to the needs of each type. Frequent inspections to insure compliance with these regulations are made by the fire-prevention authorities. Finally, there is the campaign of popular education which aims to make people realize that ignorance and carelessness are the chief factors in causing unintended fires to start. Wooden walls and shingled roofs do not cause fires to begin, but merely enable them to make rapid headway. Fires break out, in most cases, as the direct outcome of human negligence.

The work of enforcing fire-prevention rules is usually intrusted to special state or city authorities. In the latter case the fire-prevention bureau is a branch of the municipal fire department. As yet the staff of officials is too small in most cities to insure the frequent and thorough inspections which are essential to a rigid enforcement of the fire-prevention laws. Fire-prevention ought, indeed, to be a state rather than a municipal function, for if one city applies strict rules while its neighbors refrain from so doing, the general conflagration hazard will still exist and there will be inter-city friction over the matter as well.

The fire-fighting service or fire department in nearly all American cities is in charge of a commissioner or chief who is usually appointed by the mayor. The officers and men under his control are organized into companies on a semi-military plan, and one company is assigned to each fire district or precinct of

The science of fire-prevention: what it includes.

How fire-prevention rules are enforced.

The fire department.

the city with a fire-station as its headquarters. In most of the larger cities firemen are appointed under civil service rules, and a few cities have training-schools for the new men. American fire-brigades have been brought to a high plane of tactical efficiency, much higher than those of European cities. The reason is that the need for quick and effective work, because of conflagration risks, is greater here than there.

Public  
property  
and city  
planning.

Every American city is engaged in the construction and maintenance of public works or public property. This public property includes streets, sewers, bridges, parks, playgrounds, and public buildings. The convenience of the people requires that they shall all be carefully planned and built with an eye to future needs, but for the most part this has not been done because mayors and other city officials serve in office for short terms and their main concern is to do whatever happens to be urgent at the time, leaving the more difficult problems for their successors. Much of their work has therefore been purely makeshift in character,—a street widened, a temporary schoolhouse erected, a fire engine bought, and a few new sewers put in—but no comprehensive plan for street improvement or schoolhouse construction or the motorization of fire apparatus or sewage disposal has usually been made and followed. Public buildings have often been badly placed because political influences rather than public convenience determine their location. The congestion of traffic on the down-town streets, the lack of parks and open spaces in certain sections of the city, the unsightliness due to the myriad of poles, wires, signs, and billboards in many of the city's thoroughfares—these things are all due in large measure to the absence of planning. It is the habit of cities to take little or no thought for the morrow. They expect to grow bigger and busier, but they give small thought to the impending problems which growth is bound to bring. The best-built city in the United States is Washington, the streets and parks of which were all planned before a single building was erected.<sup>1</sup>

<sup>1</sup> More than a hundred and twenty-five years ago, when it was decided to build the nation's capital on the shores of the Potomac, President Washington sent to France for Major L'Enfant, an engineer who had served in the American army during the Revolution, and intrusted to him the task of laying out the new city. L'Enfant took great pains to provide for wide streets; he designated the location of the important public buildings (such as the Capitol and the White House) and left plenty of open spaces in his plan.

City planning is the science of designing cities, or parts of cities, so that they may be better places for people to live in. It includes the arranging of streets, the locating of public buildings, the providing of parks and playgrounds, the devising of a proper transportation system, and the regulating of private property in such way as to promote the best interests of the whole community. It is, therefore, or ought to be, the center or focus of all the city's activities, each one of which should be carried on in harmony with the general plan. It is only in this way that a great waste of the city's money and serious inconvenience to all classes of citizens can be prevented.

What city planning includes.

The broad scope of city planning.

Although city planning is not a new art it is only within recent years that American cities have given much attention to it. They have grown haphazard, sprawling out from a center without direction or guidance. The streets of suburban districts have been laid out by real estate subdividers to serve their own financial interests. Then, as population increases, these streets prove to be too narrow, or otherwise inadequate, and congestion is the result. City planning aims to introduce the element of foresight into municipal administration.

The streets are very important factors in the daily life of every community, far more so than we commonly realize. They are the city's arteries. On their surface they carry vehicles of every sort. Their surface also affords locations for lamp posts, telephone poles, hydrants, and many other instrumentalities of public service. Underneath the street surface are sewers, water mains, gas pipes, and conduits; overhead are wires and signs and balconies. The streets give access to the shops and houses; they are likewise the principal channels for light and air, both of which are essential to life in the buildings alongside. Nearly every form of public service depends upon the streets; without them private property would have little or no value. About one-third of all the land in the city is occupied by the streets, so that proper street planning becomes a matter of great importance to the community.

The streets.

In most American cities the streets are laid out in rectangular form, with long, broad avenues running one way and narrower cross-streets the other. This means that each intersects the other at right angles and the city blocks become squares like those of a checker-board. This plan has been widely used in America

The lay out of streets.



because it takes less land for streets than any other plan would require and it makes all building lots of convenient rectangular shape. The chief objection to this gridiron plan is that it makes traffic more congested at the junction of important thoroughfares. It also gives a sameness to the appearance of all the streets and hampers the development of architectural variety. European visitors often comment on this. Street after street in the shopping or residential districts all look alike to the stranger; all have been laid out with a pencil and ruler, the same widths (or nearly the same); every lot of land is of the same size; and the long rows of houses seem to be all of the same type. In the cities of Europe, on the other hand, the streets are more often curved or winding; some are very broad and some very narrow, so that each street has its own individuality. To some extent American cities are now laying out diagonal and winding streets in their newer suburbs on the principle that picturesqueness ought to be combined with utility.

Until very recent years in all American cities, and even yet in some of them, the practice has been to lay out streets in widths of forty, sixty, or eighty feet,—always using multiples of ten. This is a mere rule-of-thumb method and bears no direct relation to the needs of traffic. The downtown streets of the older cities are, for the most part, too narrow; in the newer suburbs they are often a good deal wider than they need be. "But what harm is done by having more street space than is necessary"? it may be asked. Well, every square foot of street space costs money; it has to be paved, kept in repair, cleaned, and lighted. The proper policy in laying out streets is to adapt their width to the probable needs of future traffic. This cannot always be done with mathematical accuracy, because the density of traffic changes from decade to decade; but with careful study a fairly dependable estimate can usually be made.

The best practice nowadays is to fix the width of new streets in terms of *traffic zones*, not merely in multiples of ten feet. A stream of traffic—motor cars, trucks, and other vehicles following one another—requires a certain sluiceway or zone to move in. This zone is ordinarily reckoned as ten feet in width. A zone of parked vehicles alongside the curb uses about eight feet. In order to allow full parking privileges and still have space for two streams of traffic to flow along easily (one in each direction) a

The old  
and the  
newer  
methods  
of deter-  
mining  
widths.

The  
traffic  
"zones."



street should be thirty-six feet in width from curb to curb. Anything less than this usually means that parking must be restricted or the thoroughfare must be made a one-way street. Anything more than this is useless unless a full zone of ten feet is added, and it is of relatively little value unless two additional zones are put on.

Apart from good planning and adequate width, the usefulness of a street depends to a considerable extent on its paving. The qualities of an ideal pavement are easy enough to specify, but not so easy to secure. To reach perfection a street pavement should be cheap to construct, durable, easy to repair, easy to keep clean, smooth, safe for traffic, noiseless, and attractive in appearance. Unfortunately there is no type of pavement possessing all these qualities. A pavement of granite block will last for many years under heavy traffic, but it is expensive to build, noisy, and hard to keep clean. The asphalt pavement is cheaper, cleaner, and easier to drive upon; but it is slippery in wet weather and breaks down very quickly when heavy traffic is allowed on it. Wood blocks have come into favor in many cities during recent years because they are believed to make a pavement which is sufficiently strong to stand the burden now placed on the streets by truck traffic and yet afford a surface which is easy to drive over, not difficult to keep clean, and relatively noiseless. There is no one best form of pavement for all sections of the city. It would be absurd to lay asphalt in the dock and shipping districts where the streets are filled with five-ton trucks, and just as absurd to put a granite-block surface on the streets of fine residential districts. The nature of the pavement should be adapted to neighborhood conditions.

When the pavement has been selected it can be laid in either of two ways—by contract or by city labor. Most pavements have been built by contract. The city officials prepare the plans, and call for bids; paving contractors submit their figures, and the contract is supposed to go to the one whose bid is the lowest. That, however, is not what always happens. Contracts for street paving have often been awarded, on one pretext or another, to contractors who were able to exert political influence. In some cities the work is done by regular employees of the street department, the city buying its own materials. This plan is usually more expensive and it is not very practicable when a

Types of  
pavement

The con-  
tract and  
direct  
labor  
systems.

city wants a great deal of work done in a hurry; on the other hand it results, as a rule, in getting pavement of a better quality. Contract work, too often, is done hastily and proves defective. Direct construction by the city's own labor force is slower, and more expensive, but usually more durable.

#### Parks.

Public parks are of two types, first the large open spaces which cover many acres and can be used by the whole city, and second, the small areas which are provided for use by a single neighborhood only. Every large city has parks of both types. The old-style park, which served more for ornament than for use, is now out of favor. Cities are placing more stress on grounds which can be used for athletic games or for other forms of recreation. In all communities which have the advantage of being located on the ocean, on a lake, or on a river, the water-front is a highly desirable addition to the available recreation spaces. Suitable bathing beaches in particular ought to be acquired by the cities for free use by the people. The development of street railway and motor transportation has lessened the pressure upon the downtown parks by making it more easy for the people to get out into the country.

From the standpoint of suitable location the public buildings of a city may be divided into three classes. First, there are those public buildings which ought to be centrally located so that they may be easily reached from every part of the community. This class includes the post-office, the city hall, the court house, and the public library. In a few cities these buildings, or most of them, have been brought together in a civic center; but as a rule they are scattered here and there all over the community, wherever they may chance to have been placed in obedience to the influences or whims of the moment. The desirability of bringing them together, both as a matter of good planning and for the public convenience, is easy to realize.

Second, there are many public buildings which must be located in different parts of the city rather than at a single center. These include the fire engine houses, police stations, elementary schools, and branch libraries. They must necessarily be scattered, but this does not mean that planning is superfluous. Very often in the past these buildings have been located at inconvenient points because political influence rather than the public interest has determined the choice of the location. When a prominent

The various classes of city buildings:

1. Those which need central location.

2. Those which must be scattered.

politician has land to sell at a fancy price the city is usually a good customer. There is no good reason why police and fire stations should not, as a rule, be housed under the same roof. There is no good reason why the school, the playground, and the branch library should not be placed upon the same plot of ground, yet rarely are these three places of instruction and recreation within sight of one another. Haphazard location and slipshod construction have resulted in large amounts of needless expense in the case of public buildings.

Third, there are certain public buildings which have to be placed in special locations. Public baths, for example, go to the water's edge, wherever it is. The hospital should be situated outside the zone of heavy traffic and continuous noise. The city prison, the poorhouse, the garbage disposal plant, and the other waifs among public buildings—nobody wants their company. They are not welcome in any neighborhood, yet they must be placed somewhere. Timely planning would help to solve this problem by securing convenient and spacious tracts of land before the city grows so large that all the available sites are occupied, but most of our cities give no thought to such questions until the problem becomes very urgent.

3. Those which need special locations.

No branch of municipal activity has made more conspicuous progress during recent years than the care for the public health. This, in turn, has been the result of the notable advance in the sciences of preventive medicine and public hygiene. The old boards of health, with their haphazard methods, have in many cities given way to highly trained health commissioners who are assisted by skilled specialists, each devoting his energies to some particular aspect of the general problem. The work of a municipal health department includes the collection and interpretation of vital statistics as a means of determining the health status of the community. Relatively few people realize that prompt and accurate reports relating to diseases and deaths form the groundwork of efficient health administration. Public health work also includes the quarantining of communicable diseases, the inspection of the milk supply, the control of every agency by which disease may be spread, and a multitude of other functions. Nearly every state also maintains a health department, which assists the city officials when necessary and exercises a general supervision over their work.

Public health and hygiene.

**Public  
sanitation.**

Public sanitation is the general term applied to the removal and disposal of waste. It is a public health enterprise. The congestion of factories, shops, and dwellings in cities make the problem of waste disposal, including rubbish, garbage, and sewage, one of great importance. Sewage, or polluted water waste, is the most constantly dangerous of them all. There are from one hundred to two hundred gallons of it to be disposed of daily for every head of population. Many plans of sewage disposal are in use by American cities. Some municipalities merely discharge untreated sewage into the sea. Others carry it to reservoirs, tanks, or basins, where it is "activated." The solids form a sludge; the effluent is run off into some neighboring waterway. Other systems of sewage disposal such as the use of slag contract-beds are in use by a few cities. Sewage is used for irrigating arid land in some European countries, but this plan has found little favor in America. No single system of sewage disposal can be designated as the best under all circumstances. Local conditions differ greatly from city to city and each case requires special study.

**Public  
utilities.**

The term public utilities is used to designate such services as water supply, gas, electricity, street railways, motor buses, telephones, power-transmission lines, and so on. These services are sometimes owned and operated by the city, but more often (except in the case of water supply) they are provided by private companies under franchises. They are subject to regulation by the municipal or state authorities. To ensure good service at reasonable rates is one of our most difficult municipal problems.

**(a) water-  
supply.**

Water supply is the oldest and in many respects the most essential among these various public utilities. A few American cities still leave this service to be provided by private companies, but in the great majority it is owned and operated by the municipality. The work is usually intrusted to a board of three or five members, who are elected in some of the smaller cities but appointed in nearly all the larger ones. Their functions are twofold: first to secure and maintain an adequate and safe source of supply; second, to provide for its distribution to the institutions, factories, shops, and homes of the city. In many cases a safe and adequate supply can be found within a reasonable distance of the city; in others, the water must be brought



a long way or must either be purified by filtration or chemically treated to make it safe. Large groups of population make heavy demands upon water-supply, averaging about one hundred gallons per capita every day in the year. A city of one hundred thousand, therefore, will have a daily requirement of ten million gallons. In its relation to public health the city's water-supply is manifestly of supreme consequence, and that is the chief reason for taking it directly under public control.

The same considerations do not operate in the case of gas, electricity, telephones and transportation. Public ownership is not so clearly indicated as the only way of protecting the public interest. But public regulation is essential; the only question is whether this regulation can be best provided by each city for itself or by the state for all the cities within its borders. The tendency is towards regulation by the state because the same public utility (telephone or street railway service, for example) may operate in several municipalities and local regulation leads to chaos.

A public utility is a natural monopoly. No ultimate good can come from the maintenance of competitive telephone or street railway services, for example. These corporations occupy a field in which competition means duplication of facilities, public inconvenience, and a far higher cost of rendering the service in the end. Two practical alternatives, and only two, are open to a city. It may give a complete monopoly to some one telephone company, street railway company, or gas company, with a defined area, and then trust to public regulation for the protection of the public interest. Or it may acquire the service and operate it under direct municipal control.

This latter alternative, municipal ownership and operation of public utilities, has made considerable progress in the United States although by no means so much as in European countries. Electric lighting has been to a considerable extent brought under municipal ownership. There are nearly six thousand electric lighting plants in American municipalities, large and small, of which number more than a fourth are in public hands. Gas lighting, on the other hand, has had no such development. There are only about thirty municipal gas plants in the entire country, as compared with about fourteen hundred in private ownership. Of the cities having over 30,000 population only five own and

(b) lighting and transportation.

The regulation of utilities.

operate their gas-lighting facilities.<sup>1</sup> One large city, Philadelphia, owns its gas plant, but has intrusted its operation to a private company. In the matter of street railways the cities of the United States have had even less experience with the policy of municipal ownership until very recent years. At the present time, however, San Francisco, Detroit and Seattle own their street railway systems in whole or in part. In some other cities including Cleveland and Boston, the street railway system is privately owned but is operated on a "service at cost" basis by the public authorities under their supervision.

Its merits  
and defects.

The experience with municipal ownership as American cities have had appears to indicate that wages and hours of labor for employees are such as to increase the costs of operation; that the quality of the service rendered is not better than under regulated private ownership; that under public ownership an additional burden is usually placed on the taxpayers and that political considerations rather than business principles determine many important questions of operating policy. On the other hand, municipal ownership assures some protection against the avaricious practices which have been more common under private operation, such as the inflation of capital stock, the payment of extravagant salaries for managerial and legal services, and the arbitrary treatment of the employees. The question as to which policy is the better cannot be answered in general terms. It can only be determined with reference to a particular city and a particular form of public service.

Public  
education.

Measured by the amount of money spent upon it, education is the most important of all municipal functions. Because of this the public schools are usually placed under the supervision of a separate board or committee, the members of which are in most cities elected directly by the people but in some are appointed by the mayor. In general these boards have three different groups of functions to perform. First, they provide the school buildings and keep them in order. Second, they have duties of a business nature, such as the purchase of fuel and supplies, the buying of school books, and the management of school finances. In some cities the school taxes are assessed and collected under the direction of the board itself; but in the

<sup>1</sup> Richmond, Va.; Wheeling, W. Va.; Duluth, Minn.; Holyoke, Mass., and Hamilton, O.

majority of them the funds for the support of the schools are obtained in part from the general city revenues and in part from the state. Finally, these school boards have the duty of appointing the superintendent, engaging and promoting teachers, determining salaries, approving changes in the school curricula and settling all questions of educational policy. These functions, when taken together, are of far-reaching influence for good or ill. From one-fourth to one-third of a city's entire annual revenue, on the average, is spent upon its schools.

To a greater extent than in most other city departments the school authorities have been called upon for many new public services during recent years. Evening schools, part-time schools, continuation schools, special classes for handicapped or defective children, the medical and dental inspection of pupils, vocational guidance, and the use of schools as neighborhood centres in evening hours—these indicate only a few of the more important services which large communities now call upon their school authorities to provide in addition to the regular work of ordinary education. During recent years, moreover, the establishment of public playgrounds and the supervision of play have in many cities become additional responsibilities. Supervised play, out of school hours, is now recognized as an integral part of a city's educational system.

The public library is potentially a far more effective agency of public education than most American cities have hitherto made it. In many municipalities it is merely a depository of books, a considerable portion of which are ephemeral works of fiction. For the most part the library authorities have not assumed an aggressive leadership in moulding the literary tastes of the people or in actively developing among them the habit of reading good books. Library boards have been made up of reputable and well-intentioned citizens who give their services without pay, but who have no special competence in educational matters and who usually fail to perceive the true relation between a public library and the masses of the people. A closer coördination between library and school administration would doubtless have beneficial results, for it is from the public schools that the future patrons of the library should be recruited. At any rate boards of education throughout the country have expanded their service to the whole people at a rate which has

The widening sphere of public education.

Public library administration.

left library administration far behind. Public libraries in American cities have been administered honestly, with fair intelligence, but with little or no imagination and almost entirely without any spirit of aggressive service.

We often hear of the "welfare work" which city departments are carrying on. It includes charities, correction, recreation, housing reform, the prevention of juvenile delinquency and so forth. Poor relief is a municipal function in some states, but in others it is a function of county government. Everywhere, however, a large part of the work is left to voluntary and private philanthropy. Prisons and institutions of a reformatory character, are also, very largely, under the control of the county or the state. Cities, however, are now giving far more attention to the preventive aspects of crime, poverty, and delinquency than in older days. The list of social welfare activities now carried on in the larger American cities would cover a whole page and it is steadily expanding.<sup>1</sup> Some call it paternalism; but are the problems of human conduct less important than those of street lighting and garbage disposal?

All these municipal enterprises cost money. Where does the money come from? Most of it is obtained by levying a municipal tax upon real estate and personal property. The property is assessed or valued by officials known as assessors, but an appeal may usually be made to a board of revision. When the assessments have been revised and confirmed a tax rate is figured, sufficient to provide such revenue as the city needs. This tax rate is fixed at so many mills on the dollar, or so many cents per hundred dollars of valuation, or so many dollars per thousand.<sup>2</sup> Then the property-owner gets his tax bill, and pays it. If he does not pay it his property is sold by the city at a tax sale or public auction, but the owner usually has the privilege of buying it back within a specified time.

Other municipal income is derived from license fees, taxes upon public utilities, profits from business enterprises owned by

<sup>1</sup> It includes, for example, such things as free employment bureaus, free legal aid, mothers' pensions, milk stations, district nursing, municipal lodging houses, classes in Americanization, free public baths, neighborhood dances under official chaperonage, playground supervision, band concerts, motion-picture shows in the parks, and so on.

<sup>2</sup> A tax rate of 22 mills on the dollar, or 22 cents per hundred dollars, or \$22 per thousand, for example, is merely the same rate expressed in different ways by different cities.

Public  
welfare  
work.

Municipal  
finance.



the city, subsidies from the state treasury,<sup>1</sup> special assessments for street paving or other improvements, and sometimes from business taxes. But all these, put together, do not usually form a third of the total revenue; by far the larger part comes from taxes on property. And since the need for more revenue has been growing steadily, this tax rate keeps going up.

Out of this annual revenue the city council (or commission) makes appropriations for the use of the various municipal departments. These appropriations are usually embodied in a yearly budget which, as has been seen, may be prepared by the mayor, or by the city manager, or by a special board, or by a committee of the city council. In any case the budget does not go into effect until the council (or commission) has approved it. The assent of the council is also necessary to the floating of any municipal loan.

The modern city is a social phenomenon of almost unbelievable complexity. Its activities range over a far wider area than the ordinary citizen realizes. Every day in the year its officials have to deal with problems of law, finance, engineering, health, education, and social welfare. No man, even though he spend a lifetime in studying them, can become thoroughly familiar with what we call "the problems of municipal administration." As for the ordinary citizen he obtains only the most rudimentary conception of them. He thinks that it is easy to administer the affairs of a city, that politicians can do it, and he wonders why it is not better done. As a first step toward any marked improvement in municipal administration we must bring home to the minds of the people the elemental fact that this work is vast in scope, endless in complexity, and difficult always.<sup>2</sup>

The  
unending  
complexity  
of  
municipal  
adminis-  
tration.

<sup>1</sup> The state sometimes levies an income tax, for example, and distributes some of the proceeds to the cities. In many states large subsidies are given for the support of the city schools.

<sup>2</sup> The entire second volume of the author's *Municipal Government and Administration* (New York, 1923) is devoted to the problems which have been merely touched upon in the foregoing chapter.

## CHAPTER XLII

### RURAL GOVERNMENT

Agriculture is not the whole of country life. The great rural interests are human interests.—*Theodore Roosevelt.*

#### I. THE COUNTY

The drift  
of the  
people.

The swing of the population is toward the cities. Nearly a third of the American people now live in cities of over 50,000 inhabitants; in another generation more than half of them will be living in such places. The rise of the city has tended to dwarf the rural community in the public mind. Yet rural government is of great importance. It has a close relation to the interests of nearly fifty million Americans. If a discussion of the subject is condensed into one brief chapter, this is only because the framework of rural government is relatively simple and the administrative problems are not so complicated as in the city.

What  
rural gov-  
ernment  
includes.

By rural government is meant the government of counties, towns, boroughs, townships, villages, and local areas known by a variety of other names. These areas are not always strictly rural in character; on the contrary, some counties are metropolitan and some towns are cities in everything but name. For the most part, however, the county, the town, and the township are units of rural government and their problems are clearly differentiated from those of the city.

Extent of  
county  
divisions.

Every state is divided into counties (in Louisiana they are called parishes). There are about 3000 of them and they vary enormously in size.<sup>1</sup> For the most part the county is a firmly established geographical area, and its boundaries are rarely changed in the older states. In the newer states the counties

<sup>1</sup> The smallest is Bristol County (Rhode Island), which contains about 25 square miles; the largest is Custer County (Montana), which contains more than 20,000 square miles—about half the area of Ohio. As to density of population, the spread is almost as great. Cochran County (Texas) had sixty-five inhabitants in 1920; Cook County (Illinois) had nearly three millions.

were mapped out in the first instance on a large scale, hence they are frequently divided as population increases.

As a general rule the creation of new counties is within the powers of the state legislature, but in many of the states there are numerous constitutional provisions which limit the legislature's authority by providing that new counties may be established or the boundaries of existing counties changed only with the consent of the voters concerned. The state legislature likewise has power to determine the form of county government, the location of the county seat, and the powers of the various county officials. This it has usually done not by enacting a general county code but it also passes special laws relating to single counties and this has led to much confusion and conflict of authority. For this reason the constitutions of many states have now set limitations upon the legislature's discretion in dealing with county affairs. In a few, in California and Maryland, for example, the inhabitants of counties are permitted to determine their own form of county government through the framing of a county charter by a board of freeholders and the adoption of the charter by vote of the people. Home rule for counties is thus following, rather slowly, in the wake of home rule for cities.

Counties are established to serve as political, administrative, and judicial districts. They are political divisions because in most of the states the county is the unit upon which representation in the state legislatures is based, each county electing one or more senators and also its quota of assemblymen or representatives. As an administrative district, however, the county is much more important. Everywhere it is an area of financial administration. The taxes are in many states assessed, levied, and collected by county officers, a part of the proceeds being turned over to the state, a part in some cases to the towns or townships within the county, and the remainder retained for county purposes. Nearly everywhere, again, the county is given considerable authority with reference to the construction and repair of main highways and bridges. Occasionally it has the duty of providing other public works as well. Poor relief, including the providing of poorhouses, is in most states a county function. Particularly in the southern states the system of elementary school administration is organized on a county

The creation of counties.

Legislative control of counties and county "home rule."

General functions of the county as an area of local government, political administrative, and judicial.

basis. The county is also a primary unit for the enforcement of law and order through its sheriff and its deputy sheriffs, especially in the sparsely settled regions; and in some parts of the country it is the recognized unit for the organization of the state militia. The administrative functions of the county are therefore varied and extensive, more so, however, in some states than in others. Finally, the county serves as a judicial district. It is a district for the administration of civil and criminal justice, usually also for the registry of deeds and the probating of wills, and almost invariably for the maintenance of courthouses and institutions of correction. In the judicial systems of the several states the county court and its various officers form an important part.

The  
county  
seat.

The centre of county government is the county seat. The selection is made by the legislature when the county is first established, and the legislature may remove it to some other city or town at any later time, but in many of the states the constitution forbids this unless the voters of the county approve the change. The county seat is the location of the county courthouse, the offices of the county board, and often the other county officers as well.

The  
county  
board.

The chief administrative organ of the county in nearly all the states is a county board. Members of this board are usually known as commissioners or supervisors. They differ greatly in number and in method of selection from state to state. In most states the boards are small, consisting of from three to seven members. In some, however, the board is a much larger body, including from fifteen to twenty-five members or even more. The methods of selecting these boards show considerable variation in different parts of the country. Sometimes the members are elected by the voters of the county at large; sometimes they are chosen by the townships, one or more from each; sometimes (especially in the southern states) the board is made up of the county judge, the justices of the peace, and certain other *ex officio* members. There is almost as much variety in county government as in city government.

Its organ-  
ization.

The functions of the county board are established by law. Some states have general laws on the subject, but in most of them the duties of county commissioners or supervisors are set forth in a long succession of separate and unrelated special acts

The  
functions  
of county  
boards:



of the legislature which sometimes apply to one county and not to others. Taking the boards as a whole, however, their functions may be grouped under six general heads: financial, highways and bridges, other public works, poor relief, elections, and miscellaneous.

Most county boards have the right to levy county taxes and to make appropriations for expenditure. There are some exceptions to this, however, notably in Massachusetts, where the appropriations are made by the legislature (usually on the recommendation of the county commissioners), and in New Hampshire and Connecticut, where the legislature retains the function both of determining the county tax rate and of making the appropriations. In most of the other states, where the county board both makes the appropriations and spends them, there is a fusion of two powers which are usually kept separate in government. In the national government, Congress makes the appropriations, and the executive has the function of applying the money to the purposes designated. In the states, again, the legislatures appropriate and the executive spends. So in the cities (except those under the commission form of government), the council votes the budget, while the mayor and the heads of departments disburse the funds. But in county government throughout the larger part of the country the same board, of three or seven or fifteen members as the case may be, lays the taxes, votes the appropriations, and then proceeds to spend the money thus appropriated. This has been criticized as an unsafe policy and in practice it has encouraged extravagance, although it does not appear to have done so on any large scale.

In addition to the function of levying county taxes, making appropriations, and supervising expenditures the county board, as a rule, has other financial duties. From time to time, both by general or special law, the board is given authority to borrow money on the county's credit, either with or without the necessity of first securing the approval of the voters. Ordinarily the county board has no general power to borrow but must obtain special legislative authority in each case. Borrowing powers are frequently obtained in this way for the building of roads, bridges, and county buildings. The county board, again, sometimes serves as a tribunal of appeal from the assessments made by local assessors or as a board of equalization for making

1. Financial.

Taxation and appropriations.

The fusion of appropriating and spending powers.

Other financial functions.

the proper adjustments in assessments among different municipalities.

2. Roads  
and  
bridges.

In many states all the important highways are either state or county roads. The town and townships are responsible for the minor thoroughfares only. Nearly everywhere the county board has authority to lay out, to construct, and to repair the various rural highways which may be designated as county roads; but there are great differences among the states in the extent to which this authority is exercised. Main bridges, especially those which connect two cities, or towns, or townships, are also commonly built and maintained by the county authorities.

3. Other  
public  
works.

Various other public works are provided by the county board, particularly the courthouse, the county jail, the house of correction, and the registry of deeds. Such buildings are often erected on an expensive scale, far more so than a county requires or can well afford. The management of these buildings, their supervision, repair and upkeep is also a function of the board. In a few states the county officials have been given other public enterprises to carry through, such as the construction of irrigation works, the abolition of grade crossings, or the building of levees, dikes, and drains. In general, when a project concerns all the municipalities in the county, or several of them, the county board is the natural authority to have charge of it.

4. Poor  
relief.

Poor relief in the great majority of the states is primarily a county rather than a municipal function. The county poor-house and county farm are well-known institutions. Persons who need public assistance are sent to these institutions from all the towns or townships of the county. County hospitals exist in a few of the states. Institutions for the care of the insane and the feeble-minded are usually provided by the state, not by the county.

5. Elec-  
tions.

County boards have various duties with reference to elections, although the New England states provide conspicuous exceptions to the general rule. Throughout the South and the West the county board has immediate charge of election machinery; it designates the polling places, appoints the poll officials, provides the ballots, and canvasses the returns. It sometimes also selects the jury panels from the voters' lists. The county, as has been already mentioned, is the prevailing unit for the selection of senators and representatives in the state legislature.

Finally, the county board has miscellaneous powers. It appoints some county officers, although in most counties these officials (such as the sheriff, the county prosecuting attorney, the registrar of deeds, the county treasurer, and county clerk) are elected by the voters. The county board sometimes grants charters of incorporation to benevolent associations. Odds and ends of jurisdiction go to the county boards here and there; for example, the extermination of noxious animals, the regulation of schools for truants, the licensing of peddlers, and so on.

It will be seen that the county board, as the chief organ of county administration, gathers to itself a considerable variety of functions. They are in part legislative, since the levying of taxes and the making of appropriations are legislative functions. But they are in larger part administrative, as has been indicated. In a few cases the county board is officially listed as a court. County boards cannot, therefore, be placed exclusively in the legislative, executive, or judicial division of government, and they are among the very few American political institutions of which that can be said.

In virtually every county there is a county court, but it is not everywhere organized in the same way. Most of the states do not have a judge for each county, but group the counties into judicial districts with one judge for each district. This judge then goes on a circuit, holding sessions at the courthouse of each county in succession. The judges are in most cases elected by the voters of the counties or districts, as the case may be, but in reality they form an **integral** part of the state judiciary.

In addition to the county board and the judge of the county court there are some other officials of county administration. The most important, at any rate the oldest of these offices, is that of sheriff. Every county in the United States has a sheriff and the office is everywhere elective save in Rhode Island. There the legislature appoints the county sheriffs. The name is an abbreviation of the old Saxon shire-reeve, which antedates the Norman conquest of England. During the middle period of English history the sheriff was the right arm of the crown in the counties, the keeper of the king's peace, and the enforcer of the common law. These functions, in a general way, the sheriff of an American county has inherited. He is the chief conserva-

6. Miscellaneous.

Some of the county board's work.

The county as a judicial area.

The county court.

Other county officials: (a) the sheriff.



tor of law and order and the executive agent of the county court. The sheriff appoints deputies who assist him in keeping the peace, attending court sessions, making arrests, serving court papers, and so forth. In sparsely settled counties the security of life and property depends to a considerable extent upon the alertness, honesty, and courage of the sheriff and his deputies. This is particularly true in time of serious disorder or riot, when the sheriff may not only "deputize" citizens, but may raise a *posse comitatus* by sending out a general call for help.

His collateral function : executive officer of the court.

The sheriff, in addition to his functions as guardian of the peace within the county, is also the chief executive officer of the county court. It is through his office that the judgments of the court are carried out. He is the keeper of the county jail and has the custody of all prisoners there. He looks after the comfort of juries while the court is in session. He or his deputies serve subpoenas upon witnesses, or seize property in satisfaction of judgment, or place writs of attachment upon property, or perform whatever other duties the court may request.

(b) the coroner.

His duties.

The coroner is another important county officer. His duty is to hold an inquest whenever a death takes place under circumstances which excite suspicion of crime. To assist him at the inquest the coroner usually calls together a jury of citizens (usually six) who hear the evidence and render a verdict. If the jury finds grounds for believing that a crime has been committed, it may so declare in its verdict, whereupon a formal warrant is issued for the arrest of the person accused. But neither the coroner nor his jury finally determines any question of guilt or innocence. That function is left to the regular courts.

Unsatisfactory character of inquests in general.

In most of the states coroners are elected by popular vote. To perform his work properly a coroner should be both doctor and lawyer. As a rule he is neither. His jury is selected by coralling anybody who happens to be near at hand. On the whole, therefore, coroner's inquests have not contributed greatly to the discovery of crimes or the apprehension of offenders. The office of coroner has a long and interesting history behind it, and one might hesitate to see it generally abolished, yet the procedure is not well adapted to conditions of to-day. In a few states the coroner has been supplanted by an appointive medical examiner, a physician with a knowledge of criminal law. This medical examiner makes his investigations without the aid of an im-



provised jury and reports the results, if necessary, to the regular prosecuting officials for action.

The regular prosecuting officer of the county is an attorney whose office bears various designations. Usually he is elected by the people of the county or district. His chief duty is that of conducting prosecutions in the name and on behalf of the state. He prepares the evidence for presentation to the grand jury and advises the jurymen as to whether there is sufficient ground for an indictment. If an indictment is found, the prosecuting attorney is responsible for the proper handling of the case when it is brought before the trial jury. Hence he has considerable discretion in the way of discontinuing prosecutions, either by entering a *nolle prosequi* or by asking that a case be placed on file. The court's approval is sometimes necessary for such action, but more often the prosecuting attorney takes the whole responsibility. In a few states the requirement of grand jury action has been abolished in all but the most serious cases. Proceedings are begun by an information, which is a sworn declaration made by the prosecuting attorney to the effect that there is sufficient ground for placing an accused person on trial.

Most people do not realize that the office of prosecuting attorney is by all means the most powerful among local offices. It has almost unlimited possibilities for good or evil. A lax and corrupt prosecuting attorney can make a fortune for himself by selling, delaying, or denying justice. Every lawless element is interested in having that sort of attorney at the helm. On the other hand a prosecuting attorney who performs his duties with honesty and courage is doing a work which law-abiding citizens ought to appreciate far more than they usually do.

Other county officers are the treasurer, who receives the revenue and makes all payments out of the county funds; the auditor, who inspects the accounts and prepares from time to time a statement of the county's financial condition for presentation to the county board; the assessors, who appraise property for taxation; the clerk of the county court, who looks after the judicial records; the registrar of deeds or recorder, and the county superintendent of schools. Not all counties have this entire set of officials. Nearly everywhere these various officials are elective, although some of them may be appointed by the county board. It is generally admitted that there are too many elec-

(c) the prosecuting attorney.

Vital character of his office.

(d) the treasurer, auditor, assessor, clerk, registrar, etc.

tive county officers and the result has been the selection of inferior men. The voter's interest is centred upon the candidates for state office on the one hand and for municipal office on the other. The county, coming in between, gets little of his attention. The consequence is that county nominations and elections have been proverbially dominated by small rings of professional politicians. The county has therefore been called "the jungle of American politics."

County government, taking the country as a whole, has not been intolerably bad, but it has been far from what it ought to be. Corruption and political dishonesty have not been so prevalent as in the cities. But mediocrity in office, unprogressiveness in policy, a failure to get full value for expenditures, favoritism in appointments and in the award of contracts, lack of popular interest in county affairs—these things have characterized county administration in most of the states. The situation has been tolerated because the need of reform in other quarters appeared to be more pressing. Now that both state and municipal governments have been improved the tide of reform is directing itself towards county affairs.

The reconstruction of county government will involve five changes in the present system. First among the needs of county government is a reconstruction of the county board in those states where it is now too large and cumbersome. There is no good reason why a county board should have more than seven members. They should be elected by the people of the whole county, or, if this does not seem practicable, by a few large districts. They should have substantially the same powers that the council or commission possesses in cities under the city-manager form of government.

Second, there is need for a unification of executive work in county government. As matters now stand there is no county official corresponding to the president, governor, and mayor in national, state, and municipal government. Executive responsibility is scattered, some of it devolving upon the county board, and the remainder accruing to the various county officers, each of whom is independent of the others. There ought to be a single head with ultimate executive authority as in national, state, and city governments. Much may be said in favor of the "manager plan" in counties as in cities and towns. The county

Actual  
workings  
of county  
govern-  
ment.

The need  
of county  
recon-  
struction.

1. The  
county  
boards  
should be  
reorgan-  
ized.

2. The  
county  
executive  
should be  
unified.

board should not try to handle the details of administration. It should employ a qualified expert. The present system is unsound in principle and is not working well.

Third, there should be a reduction in the number of elective officials. There is no good reason why treasurers, auditors, recorders and clerks should be appointed in cities and elected in counties. The elective principle, when applied to these positions, means an undue lengthening of the ballot with a consequent flagging of public interest in the candidates. With a dozen or more county officials to be elected, the average voter will not inform himself of their qualifications but will be guided entirely by party designations. The party leaders, appreciating this lack of popular interest and information, nominate men who would not be put forward for positions in the state or municipal government. Men of administrative ability cannot be secured for county offices by party nominations and popular election. That is a truism which American political experience amply verifies. Officials who have only administrative functions to perform ought to be appointed. When they perform the function of enforcing the state laws (as sheriffs and prosecuting attorneys do), they should be appointed and paid by the state, not by the county. While they perform county functions (as county treasurers, county auditors, and county clerks do) they should be appointed by the county board or by the county manager. And all the administrative officers of the county should be made responsible to the appointing authority. The present system has been called "ramshackle government," and rightly so, for there is no cohesion to it.

Civil service reform has as yet made scarcely a ripple upon the face of county politics, yet selection by merit is a principle which ought to be applied to subordinate positions in the service of the county as in that of the city, state, or nation. Clerks in courthouses, keepers in jails, attendants in poorhouses, foremen in road-construction are almost everywhere chosen by a strict application of the spoils system. The progress of civil service in other fields, moreover, has tended to make the county service a last refuge for the incompetent. The march of the merit system has been impeded there by the machine-like organization and overwhelming political influence of the "county rings" whose concerted pressure upon the state legislature is difficult to over-

3. Elective offices should be reduced.

4. Civil service reform should be applied to counties.

power. But the wedge has been inserted and the salient will be widened in time.

5. New  
business  
methods  
are needed.

The cities of the United States have made great progress in their business methods during the past twenty-five years. Many of them have adopted new budget systems, improved their book-keeping and accounting, standardized salaries, and established central purchasing agencies. To all this progress the counties, taking them as a whole, have been entirely oblivious. Most of them are using methods which the best-governed cities have long since discarded. For example, many county officers are still paid no salaries but are permitted to keep all the fees that they collect. And nobody knows how much they collect in this way! In well-governed communities this system of paying officials has long ago been abandoned. The efficiency movement has had little or no effect upon county administration save in a relatively few instances. The fifth need, then, is for a general modernizing of the business methods used by county officers.

How can  
these  
changes  
be effected?

How may these five reforms in county government be brought about? Presumably in the same way that American cities have been considerably reformed during the past twenty-five years. The legislatures should give the counties the same opportunities for reorganization that many of them have given to the cities—the opportunity to choose their own form of government, to revise it, simplify it, improve it, and make it more efficient. From municipal experience the counties can learn much if they try. But it will not be enough to provide the opportunity for reconstruction and stop there. The propulsion to reform in city government has not come from the legislatures but from the people, not from above but from below. To be really effective it must always come from below. So, if county government and administration is to be reorganized, the people of the counties must provide most of the momentum. And before they will do this they must be aroused to the need of it. Powerful civic organizations have aroused the voters of the cities, but in the counties there has been no such surge of reform propaganda. It is time for the reformers to concentrate some attention upon this dark continent of American politics.<sup>1</sup>

Special problems of county government arise whenever a large

<sup>1</sup> Some reform organizations are now doing it—the National Municipal League, for example.



city spreads itself over all or a great portion of the county area. This is the situation, for example, in Cook County which contains Chicago, in Suffolk County which shelters Boston, in Philadelphia County which includes Philadelphia, and so on. In some such cases, as in San Francisco, Philadelphia, and Boston, the same body acts as a city council and county board combined. In other instances there are separate authorities with powers which overlap and are frequently ill-defined. The city council and the county board are engaged in performing similar functions within the same area. The city assessors go around and make their valuations for municipal taxation; a week or two later the county assessors make their rounds and assess the same property for county taxes. The waste involved in all this is obvious. Much would be saved, both in time and money, by making each large city a separate county, letting the regular municipal authorities perform county functions.

The special problems of metropolitan counties.

From what has been written in the preceding pages let it not be supposed that the reconstruction of county government is a simple problem which can be solved by applying a few formulas. It is in fact one of the most difficult among all the problems of American government. And this for two reasons: first, because most of the state constitutions contain rigid provisions with reference to counties and there can be no worth-while reorganization until these are repealed; second, because "county politicians" are, on the whole, the most reactionary and the most strongly entrenched of all varieties among practical politicians. To improve county government, as city government has been improved, will therefore involve the changing of many state constitutions in the face of a determined and powerful opposition.

## II. TOWNS, TOWNSHIPS, AND VILLAGES

For purposes of local government counties are usually divided into towns, districts, or townships, but whenever any portion of a county becomes urban in character through the growth of population it is commonly organized as an incorporated village, town, borough, or city. The practice and the terminology are very different in various parts of the county. Towns are the outstanding units of local government in New England, townships are found in the middle states and the north central regions, but not in the southern or far western parts of the

The various areas of local government in the several states.

country. Villages and boroughs appear here and there without much reference to region. It would require a whole volume to explain the variations of government in them all. So nothing more can be attempted in these pages than a statement of the general principles and a summary description of the more important local units, particularly the New England town and the middle-western township.

Relation  
of local  
to state  
govern-  
ment.

The details of organization in towns, townships and villages are wholly within the control of each state. Each state has full power to devise its own system of local government, and to modify this system at will. But although each state is supreme as respects the form and functions of local government, the legislature does not always have a free hand in such matters. The state constitutions contain many limiting provisions which guarantee rights to the inhabitants of the local areas. And as constitutions are revised, the tendency is to insert more of these restrictive provisions. Within the limits set by the state constitution, however, the legislature incorporates towns, boroughs, townships, villages, or special districts. It does this by a general code or by special laws. In either case it determines what officers a community shall have, how they shall be chosen, and what their duties shall be. These duties it changes at frequent intervals until the whole body of local government law is so voluminous and complicated that even the officials themselves often do not know what their powers are. There is general agreement on the principle that local functions should be left to these local officers without state interference, but there is no agreement as to where the line between local and state functions should be drawn. In all cases of doubt the state legislature gives itself the benefit. The little red schoolhouse might be deemed a local institution, if anything is; but the state legislature usually determines the qualifications of the teacher who rules therein, and how much she shall be paid. For education, in the large, is a matter of state-wide consequence. Local government, therefore, is merely state government writ small. Its officials do, in the main, what the state laws tell them to do.

The New  
England  
town.

Among areas of local government the New England town is the oldest and most interesting. The town is not always, as the name might imply, a thickly settled community. Some New England towns are places with populations running into the

thousands, but most of them are what would elsewhere be called townships or county districts, that is to say, agricultural regions covering twenty or thirty square miles. They are not of regular shape or uniform area, having been laid out according to no fixed system of survey. They are as diverse in population as in size or shape. One Massachusetts town has a population of over forty thousand; another has less than three hundred. In Maine, Vermont, and Connecticut a few villages or boroughs have been incorporated within the limits of the towns; but in general this practice has not been pursued. A town remains a town until its people secure incorporation as a city, and some have remained so for nearly three hundred years.

The New England town does not possess a charter of incorporation, yet it has practically all the rights and privileges of a municipal corporation. Originally the towns derived their powers from the common law, but since the Revolution it has been well-settled legal doctrine that they can claim no powers except such as "have been expressly conferred by statute or which are necessary for conducting municipal affairs."<sup>1</sup> The idea that towns have inherent and unalienable rights because they are in many cases older than the states is widely held by town officers in New England; but it is without any legal basis. The New England town is as completely under the thumb of the state legislature as is the western township or any other area of local government.

Its legal status.

To some extent the powers now possessed by the towns have been conferred by a general law dealing with town government; but special statutes have also, from time to time, added new privileges or functions. To-day the New England town has substantially all the authority which a city charter conveys. It may sue and be sued, make contracts, levy taxes, borrow money, and own property. It may by ordinances or by-laws provide for the protection of life and property, the public health, and public morals. It has the usual powers of a municipal corporation to build and maintain streets and sewers, to provide water supply, public lighting, police and fire protection, parks and public buildings. It is required to establish schools, and it may maintain a hospital, a public library, and a market. Poor relief is also a town function in New England. The town, in fact, pro-

General powers of towns.

<sup>1</sup> *Bloomfield v. Charter Oak Bank*, 121 U. S. 129.

vides many services which in other parts of the country are among the functions of counties.

The town meeting.

The chief organ of town government in New England is the town meeting. An annual town meeting is usually held in May, with special meetings whenever necessary, but not more than two or three special meetings are commonly called during the year. Every voter of the town is entitled to attend the annual and the special town meetings, both of which convene in the town hall. As a rule, however, not more than half of them do attend, and the percentage is frequently much smaller. The town meeting selects its own presiding officer, who is known as the moderator, and this honor customarily goes to its most prominent citizen.<sup>1</sup>

Its organization and functions.

Town meetings are called with considerable formality, and their procedure is strictly regulated by law and tradition. The call is in the form of a warrant issued by the selectmen to the constables of the town commanding them "to notify and warn" the townsmen and to "make due return" of their having done so. The warrant specifies item by item the matters which are to be brought before the meeting and no other business can be considered. At the annual meeting the various town officers are elected for the year, a poll being opened for this purpose whenever there is a contest. Usually this polling takes place in the morning, the afternoon being devoted to a business session in which the appropriations are voted and all matters of general town policy settled. In the more populous towns, however, the polling often continues throughout the day, with the business session in the evening. When the warrant contains many items, it is impossible to finish the entire docket of business at a single session, in which case the meeting is adjourned to a subsequent afternoon or evening, and still further adjourned if necessary.

How the system works:

1. In smaller towns.

In the smaller rural towns the occasion of the annual town meeting has always been and still is a neighborhood holiday. The debate, particularly upon matters which the world would not regard as of momentous importance, is often spirited and piquant, with no dearth of humor and an occasional flare-up of personalities. A town meeting of sturdy farmers has been known to debate for more than an hour a proposed expenditure of a

<sup>1</sup> It is the highest honor that the townsmen can bestow and is appreciated accordingly. Even governors and United States senators do not disdain to serve as moderators at the annual meetings in their home towns.



few dollars. It is a picturesque gathering, this annual meeting in a small New England town, with its copious flow of homely oratory, its insistence upon settling even the smallest details by common voice, its prodigious emission of tobacco smoke, and the general retail of local gossip which takes place around the doors. In the larger towns things are quite different. There the business of the town meeting is for the most part cut and dried beforehand; a few active politicians monopolize the debate, and the large amount of business necessitates the strict application of parliamentary rules. In some of these larger towns, moreover, it has become the practice to have the moderator appoint a committee, usually of fifteen or more townsmen, which makes recommendations to the town meeting on all matters in the warrant, and these recommendations are usually adopted.

2. In larger towns.

The town meeting ceases to be a satisfactory organ of local government when the population of the town exceeds five or six thousand. When that point is reached, a reasonably full attendance of the voters becomes impractical and the control of the town policy passes into the hands of whatever element happens to be the stronger or more aggressive politically. For this reason many towns, on reaching an unwieldy size, apply for incorporation as cities. Some others, however, have been reluctant to give up local institutions which have served so long, and hence continue a scheme of government which no longer suits their needs. Others, again, have attempted to modify the town meeting without actually abolishing it, but these halfway measures do not seem to be proving altogether successful. The most common plan is to provide for a "limited town meeting." In other words, it is arranged that the voters of the town shall elect say two or three hundred of their own number to constitute the town meeting. These delegates, or representatives, sit at the front of the hall and do all the voting. The rest of the hall, including the gallery, is thrown open to all those who care to attend. Any townsman can speak on any subject at the meeting; but only the delegates are permitted to vote. This arrangement is only a makeshift. There is no practical halting place between "direct" and "representative" government. A town meeting must represent one or other of these types; it cannot embody both. A "limited" town meeting, accordingly, is not a town meeting at all but merely a town council of distended size.

Recent changes in the town meeting.

The  
selectmen.

In the earliest days of seaboard settlement the town meeting was the sole organ of town government. But it was soon found necessary to have officials who would carry the decisions of the town meeting into effect and who would also deal with minor matters in the intervals between the meetings. Hence developed the practice of choosing at the annual town meeting a committee of the townsmen, usually three or five in number, known as the selectmen.<sup>1</sup> Originally these selectmen were chosen for one year only, and that practice is generally continued, except in Massachusetts, where the term is three years in many of the towns, one selectman retiring annually. But in any event reëlections are common, and a selectman who is willing to serve is frequently continued in office for ten or a dozen years.

Their  
functions.

The selectmen form the executive committee of the town meeting. They have no legislative authority, pass no by-laws, levy no taxes, borrow no money, and make no appropriations. All these things require action by the town meeting. Nor do the selectmen appoint the town officers. Even their administrative functions, although multifarious, are of a subsidiary character. They prepare the warrants for the annual or special meetings; they grant licenses under the authority of the state laws; they lay out highways and sewers for acceptance by the town meeting; they make the arrangements for state and local elections, and they have immediate charge of town property. They usually award the contracts for public work, and all bills against the town for work or services must be approved by them before being paid. Schools are in charge of a school committee elected at the annual town meeting. The selectmen may serve as overseers of the poor, or as assessors, or as the town board of health; but in towns of any considerable size these functions are intrusted to separate boards, the members of which are also chosen at the annual town meeting. The New England town does not, therefore, possess a centralized executive authority. The selectmen share executive functions with various boards and officials who are not under their control.

Other  
town  
boards  
and  
officials.

The number and nature of these boards and officials depend upon the size of the town. Most of the towns have a school committee or board of school trustees, a board of health, and a

<sup>1</sup> In Rhode Island this body is not known as the board of selectmen but as the town council.

board of overseers of the poor. A large town may also have a water board, a library board, and a board of park commissioners. As for administrative officials, every town has its town clerk, who is perhaps the most important among local officers. Many functions are placed upon him by state law, such as the issuing of marriage licenses, the registration of births and deaths, the transmission of various reports to the state authorities, and in some states the recording of deeds and mortgages. In addition the town clerk is the keeper of the local records and the general factotum of the selectmen. He is elected by the town meeting, receives a salary, and is usually continued in office so long as he does his work satisfactorily. Each town also has its assessors, its town treasurer, its constables, and often a considerable list of minor officials, such as poundkeepers, fence viewers, sealers of weights and measures, and so on. These officers are usually chosen by the town meeting, but in some towns the selectmen appoint to the minor posts.

One reason for this multiplication of administrative boards and minor officials, even in towns which have relatively small populations, may be found in the fact that most town officers serve without pay. If the work were concentrated in a few hands, there would be a demand for remuneration. In the smaller communities this plan of administration by scattered and unpaid agencies serves well enough and has the merit of cheapness; but in the larger towns, where there is much public business to be done, it falls far short of the requirements and has had to be in part abandoned. These places, as a rule, are now putting paid officials in charge of the more important services.

New England town government has three centuries of good tradition behind it and enjoys a splendid reputation, which, however, is not wholly deserved. Those who are not in close touch with the actual facts of the situation imagine that these towns are miniature republics, left to handle their own local affairs in their own way, free from legislative interference, and governing themselves admirably by the device of a mass meeting. That is a pretty picture, no doubt, but far from being a true likeness.

The New England town has in reality no more home-rule than the New England city. It is buffeted in all directions by the action of the state legislature, and scarcely a year ever passes

Why so many officials?

Erroneous notions concerning New England town government.

without new duties being thrown by the state upon town officers. The New England town has a form of government which serves well enough for a very small community where there are no important public services to be provided, where the people are all or nearly all of native stock, and where every one knows his neighbors. But in its application to places of several thousand inhabitants, and particularly to industrial towns which have a considerable proportion of foreign-born voters, it has no marked merits except those of age and good historical association. In point of actual accomplishment, it is no better than the newer forms of local government which exist in other parts of the country.

Townships, as areas of local government, are equally important in the middle western states. In some of them the territory is mapped out into uniform blocks, six miles square. The surveying was done when these regions were territories under the jurisdiction of Congress, hence the divisions are sometimes called congressional ownerships. In some of these states the township meeting is an institution of local government, but nowhere outside of New England has it developed much vitality, and its chief function is that of electing the township officers.<sup>1</sup> In other states there is no town or township meeting, the work of local administration being wholly carried on by officers elected at the polls.

The administrative work of township government is carried on either by a board of trustees or by a single officer known as the supervisor. Where the board system prevails there are different ways of constituting the board, although its members are always elected by the voters. The powers of the board also vary from state to state. So it is with the single supervisor, an elective official, whose functions are more extensive in some of the states than in others. Towns and townships also have their clerks, treasurers, assessors, constables, highway overseers, justices of the peace, and other local officials, all or most of them elected.

Township government has been greatly weakened by the practice of incorporating as a separate municipality any portion of the township which becomes urban in character. Nearly all

<sup>1</sup>The chief reason for this, no doubt, is the purely artificial nature of the township. It has no social homogeneity or local self-consciousness like the New England town. By incorporation, moreover, the thickly settled portions of townships are usually organized as cities or villages, thus breaking into the original unit.

Townships  
in  
the middle-  
western  
states.

The  
organs of  
town and  
township  
govern-  
ment.

The in-  
corporated  
muni-  
cipalities,  
villages,  
and  
boroughs.



the states now make provision by general law for the organization of these thickly settled areas under the name of villages, boroughs, incorporated towns, or cities. The usual course is for the inhabitants to present a petition to some designated officer, who submits the question of incorporation to a vote of the people, and if they decide affirmatively, the petition is granted. The region is thereupon incorporated as a village, borough, town, or city, as the case may be. Usually there is a minimum requirement as to population: from two hundred to three hundred in the case of a village, from two thousand to twelve thousand where the petition is for incorporation as a city.

When a region is thus incorporated, it passes from the jurisdiction of the township officers and sets up its own local government. In the case of a village this government commonly consists of a board of trustees or a council with from three to nine elected members, together with a chief executive officer, called a mayor or village president, who is either chosen by the trustees or by the village voters. In the case of a borough, an incorporated town, or a city, the organization is along somewhat the same lines; but the governmental mechanism is more elaborate. The general laws of each state provide what powers these local governments shall exercise, but they generally include the making of by-laws, the management of streets, water supply, sanitation, police, fire protection, and public recreation. Taking the United States as a whole, there are more than ten thousand of these small incorporated municipalities. They differ so widely in size, population, form of government, and functions that no general description will hold strictly true in relation to all or even to any large number of them.

In the southern states the county remains the dominant area of local government. There are no towns as in New England, and only in scattered regions any system of organized township government. Instead of townships the counties usually have districts for such purposes as the management of schools, the building of highways, the holding of elections, and the administration of justice. These districts are not corporate entities, like towns or townships; they have no taxing power and they exist for certain designated purposes only. In some southern states they are called magisterial districts; in others the name township is used, although the term is misleading.

The  
county  
divisions  
in southern  
states.

The  
county  
divisions  
in states  
of the  
Far West.

Finally, in the far western states, the system of incorporated districts is more or less general. It is a common practice to divide the county into school districts, sanitary districts, irrigation districts, and road districts, each for the purpose indicated by its name and each with elective officers. The county in these sections remains the chief unit, but its authorities cannot conveniently carry out all the work that needs to be done. A division into districts is made for single functions. These districts are commonly known as "quasi-municipal corporations" to distinguish them from regular municipalities such as cities, towns, and townships. But they have power to tax, power to borrow, and most of the other powers which municipal corporations possess.

The rare  
Mosaic  
of local  
areas.

What a welter of local areas we may have, therefore, within the bounds of a single state! Illinois, for example, has 102 counties, 72 cities of over 5000 population, 1400 townships, 800 villages or thereabouts, more than 800 drainage districts, 12,000 school districts, and in addition an uncounted number of road districts, park districts, sanitary districts, and districts of various other varieties. It is within bounds to say that there are probably 20,000 municipal corporations, and quasi-municipal corporations in this one state. Give them, on an average, only a dozen officials apiece (Cook County alone has over 2500), and you have a quarter of a million officers of local government—one for every ten adults in the whole population of the state.

Local  
govern-  
ment and  
democracy.

Local democracy is the foundation of national democracy. But the democracy of a government, whether national or local, is not to be judged by the number of officials whom the people elect. Too many officials, too frequent elections, too much parcelling of powers and functions—they all tend to subvert democracy by placing authority in the hands of an invisible monarch known as the local "boss" who lords it over them all. The way to keep democracy genuine is to have relatively few elective officers, give them large powers and hold them directly accountable for its exercise.<sup>1</sup>

<sup>1</sup> Useful books for reference on American rural government are John A. Fairlie, *Local Government in Counties, Towns and Villages* (New York, 1906); H. G. James, *Local Government in the United States* (New York, 1921); H. S. Gilbertson, *The County* (New York, 1917); and Kirk H. Porter, *Town and County Government* (New York, 1922).

## APPENDIX

### CONSTITUTION OF THE UNITED STATES

WE the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

#### ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. 1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes<sup>1</sup> shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.<sup>2</sup> The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any State, the

<sup>1</sup> See the 16th Amendment, below, p. 669.

<sup>2</sup> Partly superseded by the 14th Amendment. (See below, p. 668.)

executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SECTION 3. 1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.<sup>1</sup>

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.<sup>1</sup>

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside: and no person shall be convicted without the concurrence of two thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SECTION 4. 1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. 1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

<sup>1</sup> See the 17th Amendment, below, p. 669.



2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. 1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION 7. 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

✓ SECTION 8. 1. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post offices and post roads;

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

SECTION 9. 1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.<sup>1</sup>

5. No tax or duty shall be laid on articles exported from any State.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another: nor shall vessels bound to, or from, one State be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. 1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II

SECTION 1. 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

<sup>2</sup> The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of

<sup>1</sup> See the 16th Amendment, below, p. 669.

<sup>2</sup> The following paragraph was in force only from 1788 to 1803.

the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate. The president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President ; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.<sup>1</sup>

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

4. No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President ; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enter on the execution of his office, he shall take the following oath or affirmation : — “ I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.”

SECTION 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have

<sup>1</sup> Superseded by the 12th Amendment. (See p. 667.)



power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. 1. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION 4. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more States; — between a State and citizens of another State; <sup>1</sup> — between citizens of different States, — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court

<sup>1</sup> See the 11th Amendment, p. 667.

shall have appellate jurisdiction, both as to law and to fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained.

#### ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SECTION 2. 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

#### ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for pro-

posing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several States, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## ARTICLE VI

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names,

Go: WASHINGTON—

Presidt. and Deputy from Virginia

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Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I<sup>1</sup>

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>1</sup> The first ten Amendments adopted in 1791.

## ARTICLE II

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

## ARTICLE III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

## ARTICLE VIII

Excessive bail: shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



## ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI<sup>1</sup>

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

ARTICLE XII<sup>2</sup>

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots, the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

<sup>1</sup> Adopted in 1798.

<sup>2</sup> Adopted in 1804.

ARTICLE XIII<sup>1</sup>

SECTION 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV<sup>2</sup>

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV<sup>3</sup>

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

<sup>1</sup> Adopted in 1865.

<sup>2</sup> Adopted in 1868.

<sup>3</sup> Adopted in 1870.

**SECTION 2.** The Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XVI<sup>1</sup>

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

#### ARTICLE XVII<sup>2</sup>

The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, for six years ; and each senator shall have one vote. The electors in each State shall have the qualifications required for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the Constitution.

#### ARTICLE XVIII<sup>3</sup>

**SECTION 1.** After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

**SECTION 2.** The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

**SECTION 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

#### ARTICLE XIX<sup>4</sup>

**SECTION 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of sex.

**SECTION 2.** Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

<sup>1</sup> Passed July, 1909; proclaimed February 25, 1913.

<sup>2</sup> Passed May, 1912, in lieu of paragraph one, Section 3, Article I, of the Constitution and so much of paragraph two of the same Section as relates to the filling of vacancies; proclaimed May 31, 1913.

<sup>3</sup> Proclaimed January 29, 1918.

<sup>4</sup> Proclaimed August 26, 1920.





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